

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 19.

**GERMAN ALLIANCE INSURANCE COMPANY,
PETITIONER,**

vs.

HOME WATER SUPPLY COMPANY.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.**

**PETITION FOR CERTIORARI FILED MARCH 18, 1910.
CERTIORARI AND RETURN FILED APRIL 18, 1910.**

(22,069)

(22,061)

SUPREME COURT OF THE UNITED STATES

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GERMAN ALLIANCE INSURANCE COMPANY,
PETITIONER,

vs.

HOME WATER SUPPLY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT

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Transcript of Record.

United States Circuit Court of Appeals, Fourth Circuit.

No. 882.

GERMAN ALLIANCE INSURANCE COMPANY, Plaintiff in Error,
versus
HOME WATER SUPPLY COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for for the District
of South Carolina, at Greenville.

Record filed January 11, 1909.

[Stamped:] Clerk's Office, U. S. Circuit Court of Appeals, Fourth
Circuit. Henry T. Meloney, Clerk, Richmond.

1

Transcript of Record.

Caption.

THE UNITED STATES OF AMERICA,
District of South Carolina, To wit:

In the Circuit Court, Fourth District.

At a Circuit Court of the United States for the District of South
Carolina, begun and held at the Court House, in the City of Green-
ville, on the third Tuesday of April, 1908, being the 21st day of
the same month, in the year of our Lord one thousand nine hun-
dred and eight.

Present: The Honorable William H. Brawley, United States Judge
for the District of South Carolina:

Among other were the following proceedings, to-wit:

At Law.

GERMAN ALLIANCE INSURANCE COMPANY, Citizen of the State of
New York, Plaintiff,
vs.
HOME WATER SUPPLY COMPANY, Citizen of the State of South Caro-
lina, Defendant.

Summons.

Filed May 7, 1907.

United States of America, District of South Carolina, in the Circuit Court.

GERMAN ALLIANCE INSURANCE COMPANY, Citizen of the State of New York, Plaintiff,
against

HOME WATER SUPPLY COMPANY, Citizen of the State of South Carolina, Defendant.

To Home Water Supply Company, defendant in this action:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer on the subscriber at his office, in the City of Spartanburg, S. C., on or before the rule day occurring twenty days after the service of this summons on you, exclusive of the day of service.

If you fail to answer this complaint within the time aforesaid, the plaintiff will apply to the court for judgment against you for the sum of thirty-eight thousand eight hundred and ten dollars, with interest from April 6, 1907.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at Charleston, South Carolina, the 7 day of May, Anno Domini, one thousand nine hundred and seven and in the 131st year of the Sovereignty and independence of the United States of America.

STANYARNE WILSON,
*Plaintiff's Attorney.*C. J. MURPHY,
[SEAL.] C. C. C. U. S., Dist. S. C.*Complaint.*

Filed May 7, 1907.

United States of America, District of South Carolina, in the Circuit Court.

GERMAN ALLIANCE INSURANCE COMPANY, Citizen of the State of New York, Plaintiff,
vs.

HOME WATER SUPPLY COMPANY, Citizen of the State of South Carolina, Defendant.

Plaintiff above-named, complaining of the defendant herein, respectfully shows to the court:

1. That at the times hereinafter mentioned, plaintiff was and still is a fire insurance company chartered and organized by law of the State of New York, and resident and citizen of said State.

2. That at the same time defendant, Home Water Supply Company, was and still is chartered and organized under the laws of the State of South Carolina and doing business in the City of Spartanburg, as hereinafter more particularly stated, and a resident and citizen of South Carolina.

3. That at the same time Spartan Mills was and still is a corporation chartered and organized under the laws of said State of South Carolina, doing business in and owning the property hereinafter more particularly described, located in said City of Spartanburg.

4. That on August 29, 1906, plaintiff, for valuable consideration, made a contract of insurance with Spartan Mills, evidenced by plaintiff's policy, #80106, whereby it insured against loss by fire—for a period of five years from said date—certain of said Spartan Mills houses located in said city, by form of policy known as "Standard," to-wit: Forty-four five room houses, seven ten-room houses, two fourteen room houses, and one sixteen-room house; the same being of the estimated value of forty-six thousand four hundred and nine dollars, and carrying insurance under said policy in the total amount of thirty-nine thousand four hundred dollars. That said property was under the protection of said policy when destroyed by fire on March 25, 1907, and so known to defendant. That the destruction of all the houses was total, except one six-room house which was only damaged to the extent of ten dollars; making the entire loss to plaintiff thirty-eight thousand eight hundred and ten dollars.

5. That on April 6, 1907, plaintiff paid said Spartan Mill the full amount of said loss under said policy, receiving credit for one per cent. discount for paying in advance of maturity, and thereupon received from said insured the following subrogation receipt, to-wit:

Subrogation Receipt.

Received of the German Alliance Insurance Company of New York, the sum of thirty-eight thousand, four hundred and twenty-one and 90-100 dollars, being in full of all claims and demands for loss and damage by fire on the twenty-fifth day of March, 1907, to the property insured by policy No. 80106 and Renewal No. — issued at the Spartanburg, S. C., office of said company, and in consideration of such payment the undersigned hereby assigns and transfers to the said company each and all claims and demands against any person, persons, corporations or property arising from or connected with such loss or damage and the said company is subrogated in the place of and to the claims and demands of the undersigned against said person, persons, corporations or property in the premises to the extent of the amount named.

4 In witness whereof we have hereunto set our hand and seal this the sixth day of April one thousand nine hundred and seven.

SPARTAN MILLS, [L. S.]
By W. S. MONTGOMERY. [L. S.]

In presence of—

(Signed) A. W. GRIFFITH.

6. That said Spartan Mills was then and still is a corporation located in said city, doing business therein, with all of its property within the city limits, and a tax-payer of said city, contributing to the support of its government, entitled to the protection thereof and of all contracts made by the city for the protection from fire of property within its limits.

7. That on or about February 14, 1900, by ordinance of the City Council of said city duly made, ratified and promulgated, a contract was made and entered into by said city, through its City Council, and defendant Home Water Supply Company, through its representatives, and thereafter ratified by said company, whereby, for valuable consideration, said defendant company undertook to furnish adequate water protection to the property of the residents of said city, including said Spartan Mills, for a period of thirty-three years from said date. That the following are sections of such contract applicable to this action,—a copy of the contract in its entirety being now in possession of said defendant company, and which, for that reason is not fully incorporated herein, to-wit:

“SECTION 1. The said John B. Cleveland and his associates or assigns for the said Home Water Supply Company are hereby authorized and empowered to maintain, operate and own water works in the city of Spartanburg to supply the city and its inhabitants with pure and wholesome water, suitable for fire, sanitary and domestic purposes; to lay down pipes and water mains for the purpose of making extensions along the streets, avenues and alleys of said city; to acquire and hold any and all real estate, easement and water rights necessary to that end and purpose, to use within the present and future limits of said city all streets, alleys, avenues, bridges, bed of streams and such public grounds as now or may hereafter be laid out; to receive, take, store, purify, conduct, and distribute water through said city, to erect and maintain settling basins, filtering galleries, reservoirs, water tower and all other necessary buildings, and machinery and other appliances, or attachments, necessary or expedient for the purpose of conducting and carrying on of said water works; to cross any street in said city for the purpose of laying pipes, conduits or aqueducts which may be necessary for the proper distribution of water throughout said city, so as to effect the most adequate supply for domestic use and greatest protection against fire. The said grantees to have the right to maintain, establish, conduct and operate said water works, as here specified for the term of thirty-three years from the first day of January, 1900.

SECTION 2. The water to be obtained by and through said water works shall be obtained from Chinquepin Creek and Archer's Branch, otherwise known as Arthur's Branch, just as it is now taken by the water works plant. The good character, quality and quantity of the water shall at all times be maintained by the said grantees and great care shall always be taken to prevent the source of the supply from being polluted or contaminated. That the water works committee shall have the right to require the dams and reservoirs emptied and cleaned out whenever they think necessary for the purity and protection of the water supply. Nothing in this section shall be con-

strued to hold the said grantees responsible for the failure of said creek to supply sufficient water in case of long protracted drought, and said City of Spartanburg agrees to enforce by proper police regulations and provisions of an Act of the General Assembly of the State of South Carolina, to protect the said supply from being contaminated.

SECTION 3. That in the work of laying pipe and making extensions or alterations, the said grantees shall not unnecessarily obstruct any street, alley, avenue or public ground, and in laying pipes and conduits, they shall repair and make good any gas or sewer pipes previously laid, that shall be disturbed by them and restore the street, alley, avenues and public grounds to as good condition as near as practicable, as they were before said work was commenced, and in making alterations or extensions or repairs in any street, alleys, avenues or public grounds, and in removing pavements and side walks, and making necessary excavations for repairs, they shall suitably guard and protect the same so as to prevent any injury to persons and to public and private property by reason thereof, and the said grantees shall be liable for all damages by failure to guard and protect persons or property from injury, when occasioned by the negligence of said grantees, their agents or employees, and shall hold the city harmless therefrom.

SECTION 4. The specifications as to engines, boilers, stand-pipe, water pressure, character and size of water mains used, shall
6 in every way conform to the specifications contained in the contract originally made with Moffett, Hodgkins and Clark. That when mains are put in for City Fire protection they shall not be less than six inches, unless permission is granted by the City Council.

SECTION 5. The city agrees to use the hydrants of the grantees for the extinguishment of fires only and for sprinkling purposes, under such regulations as may hereafter be made, and to make good to the grantees any injuries which may happen to them when used by any officer or servant of said city or any member of its fire department, and hereby agrees to pay rent for the said fire protection the sum of forty dollars per annum for each and every hydrant for the term of ten years from the first day of January, 1900. Said rental to be paid in two equal annual instalments on the first day of January and first day of July.

The said grantees shall constantly, day and night, except in the case of an unavoidable accident, keep all the said hydrants supplied with water for fire protection, and shall keep them in good order and efficiency for such service and shall always maintain a height of at least seventy (70) feet of water in the stand-pipe or water tower, except in case of unavoidable accident, or when water shall be drawn off for the clearing the same, or for any cause which cannot be controlled by grantees, and in case any of the hydrants shall be out of order, and the Chief of the Fire Department shall notify any officer in charge of said water works of that fact, and such hydrant shall remain out of order and unfit for use for a longer time than twenty-four hours after such notice, then, the said grantees will pay to the

the main intermediate hydrant to put in and maintain at no cost intermediate fire hydrants wherever the intervals on the original location are five hundred feet or less, free of charge for water during the term of this agreement. Said intermediate hydrant to be used for fire purposes only, and for the benefit of the City only.

SECTION 6. And the city may at any time require the said grantees to make extensions of the pipe system of the said water works, by giving sixty days' notice to said grantees, and may order hydrants placed on such extensions at not less than ten to the mile, and the city agrees to pay rental for fire protection upon such extensions at the rate of forty dollars per year, per hydrant, for such unexpired

term of the contract or renewals thereof from the time of
7 making such extensions, on the first days of January and

July in each and every year during the continuance of this contract, and a sufficient tax shall be collected annually upon all taxable property of said city to meet the payments under this contract and ordinance, when and as they mature, during the existence of this contract or renewals thereof, which tax shall be irrepealable from and after the passage of this ordinance. The thread of all said hydrants shall be made to fit any particular hose coupling now in use by the fire department of the City of Spartanburg, which shall in ten days after the passage of this ordinance, or contract be presented by the Mayor of said city to the grantees for such purpose.

8. That the following is section 4 of the contract with Moffett, Hodgkins and Clark, referred to in section 4 of the contract with defendant company, to-wit:

SECTION 4. The said water works shall be complete and perfect in all its details as far as practicable. The pump house and boiler house combined shall be of suitable design, built of stone or brick, with tin or iron roof. There shall also be an engineer's dwelling in close proximity to said pump and boiler house. The machinery of said water works shall consist of one compound, condensing duplex steam pump, and one high pressure duplex pump, with return flue tubular steam boilers and other attachments, necessary to give a capacity to pump one million gallons in twenty-four hours against a pressure equivalent to a head of 200 feet, and a metallic stand-pipe or water tower made of the best material and of a capacity of not less than 130,000 gallons, and high enough to afford a head of at least 100 feet above Main street at the Windsor Hotel, or high enough to give adequate domestic pressure in any part of the city, and so arranged that it can be shut off from the pipe system by our patent electrical appliance for opening or shutting the valve or gate, so that in case of necessity and more pressure is required than is afforded by the water tower, the engineer can immediately pump direct into the mains, and give any pressure required, by direct pumping. All of the machinery shall be increased from time to time as the growth of the city may require. All of the water mains and pipes used by the said grantees shall be of the best quality of cast iron, coated inside and out with Dr. Angus Smith's patent coal tar varnish, and shall be

Return of Service.

UNITED STATES OF AMERICA,
District of South Carolina, ss:

I hereby certify and return that I served the annexed summons and complaint on the therein named Home Water Supply Company, by handing to and leaving a true and correct copy thereof with Jesse Cleveland, secretary and treasurer, personally, at Spartanburg, in said district, on the 9 day of May, A. D., 1907.

J. DUNCAN ADAMS,
U. S. Marshal,
 By J. H. McLANE, *Deputy.*

Notice of Appearance.

Filed May 21, 1907.

Ralph R. Carson, Attorney and Counselor at Law,
 Suite 4, Cleveland Building, Spartanburg, S. C.

MAY 20, 1907.

Mr. C. J. Murphy, C. C. C. U. S., Charleston, S. C.

DEAR SIR: I appear for the defendant in the case of German Alliance Insurance Co. vs. Home Water Supply Co.

Please enter this appearance on record. If it is necessary that I file a more formal notice, kindly advise me.

Yours very truly,

C—c.

RALPH K. CARSON.

10

Demurrer.

Filed June 3, 1907.

United States of America, District of South Carolina, in the Circuit Court.

GERMAN ALLIANCE INSURANCE COMPANY, Citizen of the State of New York, Plaintiff,

vs.

HOME WATER SUPPLY COMPANY, Citizen of the State of South Carolina, Defendant.

The defendant demurs to the complaint herein for the grounds that it appears upon the face of the complaint; that the complaint does not state facts sufficient to constitute cause of action.

(1) That said complaint fails to state a cause of action in favor of the plaintiff against the defendant.

(2) That no privity of contract is shown between the plaintiff and defendant.

(3) Because the alleged failure of the defendant to lay water mains would not give the plaintiff or Spartan Mills a right of action against the defendant.

(4) Because a tax payer or its assignee would have no right of action against the defendant for failure to obey the City Ordinance, or for violation of, or failure to perform the contract made by the defendant with the City of Spartanburg.

RALPH K. CARSON,
Attorney for the Defendant.

I hereby certify that the foregoing demurrer is meritorious, and not intended merely for delay.

RALPH K. CARSON,
Attorney for the Defendant.

11 *Order Sustaining Demurrer and Dismissing Complaint.*

Filed 14 of July, 1908.

United States of America, District of South Carolina, in the Circuit Court.

GERMAN ALLIANCE INSURANCE COMPANY, Citizen of the State of New York, Plaintiff,

vs.

HOME WATER SUPPLY COMPANY, Citizen of the State of South Carolina, Defendant.

Upon hearing the demurrer in the case above stated and argument thereon, and after consideration thereof, it is

Ordered and adjudged that the demurrer be sustained and the complaint dismissed.

WM. H. BRAWLEY,
U. S. Judge.

July 14, 1908.

Petition for Writ of Error and Allowance of Writ.

Filed Dec. 2, 1908.

UNITED STATES OF AMERICA,
District of South Carolina:

In the Circuit Court, Fourth District.

GERMAN ALLIANCE INSURANCE COMPANY, Citizen of the State of New York, Plaintiff,
against

HOME WATER SUPPLY COMPANY, Citizen of the State of South Carolina, Defendant.

And now comes German Alliance Insurance Company, citizen of the State of New York, plaintiff herein, and says:

That on or about the 14th day of July, 1908, this court granted an order and judgment sustaining the demurrer herein in favor of the defendant against this plaintiff, in which order and judgment certain errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, plaintiff prays that a writ of error may issue in its behalf to the United States Circuit Court of Appeals for the Fourth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly
12 authenticated, may be sent to the Circuit Court of Appeals.

GERMAN ALLIANCE INSURANCE
COMPANY,

By WILSON & OSBORNE, *Attorneys.*

Writ allowed.

WM. H. BRAWLEY,

U. S. Judge.

Dec. 19, 1908.

Assignment of Errors.

Filed Dec. 2, 1908.

UNITED STATES OF AMERICA,
District of South Carolina:

In the Circuit Court, Fourth District.

GERMAN ALLIANCE INSURANCE COMPANY, Citizen of the State of
New York, Plaintiff,
against

HOME WATER SUPPLY COMPANY, Citizen of the State of South Carolina, Defendant.

To the Honorable the Judge of the Circuit Court for the District of South Carolina:

The plaintiff, by counsel, respectfully assigns the following errors to the order and judgment of this court sustaining the demurrer herein:

1. The complaint shows the cause of action in favor of plaintiff against the defendant as follows:

Plaintiff, an insurer, for valuable consideration, placed forty-six thousand four hundred and sixty-nine dollars of insurance, by standard form of policy, upon certain houses of Spartan Mills, located in the City of Spartanburg, South Carolina. The houses were destroyed by fire March 25, 1907, while under the protection of the policy. The loss was adjusted at thirty-eight thousand eight hundred and ten dollars and paid to said Spartan Mills by the plaintiff, as required by the contract between the parties, and the plaintiff received from the insured a subrogation receipt for the amount, and

an assignment and transfer to plaintiff "of each and all claims and demands against any person, persons, corporations, or property, arising from or connected with such loss or damage," and subrogated plaintiff in its place to its claims and demands against all persons or corporations, to the extent of said amount.

13 By ordinance of the City of Spartanburg, of date February 14, 1900, a contract was made between the City and the defendant, whereby the defendant company undertook to furnish adequate water protection to the property of the residents of the city, including said Spartan Mills, for a period of thirty-three years from that date, some of the provisions of which ordinance were as follows:

"The said John B. Cleveland and his associates or assigns for the said Home Water Supply Company are authorized and empowered to maintain, operate and own water works in the city of Spartanburg to supply the city and its inhabitants with pure and wholesome water, suitable for fire, sanitary and domestic purposes; to lay down pipes and water mains for the purpose of making extensions along the streets, avenues, and alleys of said city; to acquire and hold any and all real estate, easements and water rights necessary to that end and purpose, to use within the present and future limits of said city all streets, alleys, avenues, bridges, beds of streams and such public grounds as may now or hereafter be laid out; to receive, take, store, purify, conduct, and distribute water through said city, to erect and maintain settling basins, filtering galleries, reservoirs, water tower and all other necessary buildings, and machinery and other appliances, or attachments, necessary or expedient for the purpose of conducting and carrying on of said water works; to cross any street in said city for the purpose of laying pipes, conduits or aqueducts which may be necessary for the proper distribution of water throughout said City, so as to effect the most adequate supply for domestic use and greatest protection against fire. The said grantees to have the right to maintain, establish, conduct and operate said water works, as here specified for the term of thirty-three years from the first day of January, 1900.

"The said grantees shall constantly, day and night, except in the case of an unavoidable accident, keep all the said hydrants supplied with water for fire protection, and shall keep them in good order and efficiency for such service and shall always maintain a height of at least seventy (70) feet of water in the stand-pipe or water tower, except in case of unavoidable accident, or when water shall be drawn off for the clearing the same, or for any cause which cannot be controlled by grantees, and in case any of the hydrants shall be out of order, and the Chief of the Fire Department shall notify any officer in charge of said water works of that fact, and such hydrant shall remain out of order and unfit for use for a longer time than
14 twenty-four hours after such notice, then the said grantees shall pay to the city the sum of seven dollars per week for such hydrant, until it is put in order for use. And the city shall have the right to open the mains hereinbefore located to put in and maintain at its own cost intermediate fire hydrants wherever the in-

tervals on the original location are five hundred feet or less, free of charge for water during the term of this agreement. Said intermediate hydrant to be used for fire purposes only, and for the benefit of the city only.

"And the city may at any time require the said grantees to make extensions of the pipe system of the said water works, by giving sixty days' notice to said grantees, and may order hydrants placed on such extensions at not less than ten to the mile, and the city agrees to pay rental for fire protection upon such extensions at the rate of forty dollars per year, per hydrant, for such unexpired term of the contract or renewals thereof from the time of making such extensions, on the first days of January and July in each and every year during the continuance of this contract, and a sufficient tax shall be collected annually upon all taxable property of said city to meet the payments under this contract and ordinance, when and as they mature, during the existence of this contract or renewals thereof, which tax shall be irrevocable from and after the passage of this ordinance. The thread of all said hydrants shall be made to fit any particular hose coupling now in use by the fire department of the City of Spartanburg, which shall in ten days after the passage of this ordinance or contract be presented by the Mayor of said City to the grantees for such purpose.

"The machinery of said water works shall consist of one compound, condensing duplex steam pump, and one high pressure duplex pump, with return flue tubular steam boilers and other attachments, necessary to give a capacity to pump one million gallons in twenty-four hours against a pressure equivalent to a head of 200 feet, and a metallic stand-pipe or water tower made of the best material and of a capacity of not less than 130,000 gallons, and high enough to afford a head of at least 100 feet above Main street at the Windsor Hotel, or high enough to give adequate domestic pressure in any part of the city, and so arranged that it can be shut off from the pipe system by our patent electrical appliance for opening or shutting the valve or gate, so that in case of necessity and more pressure is required than is afforded by the water tower, the engineer can immediately pump direct into the mains, and give any pressure required by direct pumping. All of the machinery shall be increased

from time to time, as the growth of the city may require."

15 That in 1905 and 1906, the City Council ordered the company to put in certain hydrants with connecting pipe, which order, if obeyed, would have carried water protection, to-wit: to within about 200 feet of the first of the buildings which caught fire on said March 25, 1907, instead of something near 650 feet, which was the distance of the nearest hydrant to the fire on said date; but that the defendant, in violation of its duty and obligation, in utter disregard of the property under its contracted and sole protection, and of its obligations to adequately protect the same from fire, and in flagrant defiance of said reasonable and proper order of Council, failed and refused to make such extension, and that as a direct result and consequence, there was no hydrant or plug near enough to fur-

nish water to extinguish said fire; all due to defendant's culpable and wilful negligence and disregard of its duty and obligation to said city and its inhabitants.

Also that defendant further failed and neglected to discharge its duty to said property and its owners, and was culpably and wilfully careless of its duty to them and to the city and its inhabitants, in not having the sufficient pressure which it undertook to furnish, or anything like it; in not having pipe of sufficient size at the nearest approach to said locality, to-wit: at least six-inch pipe, instead of inadequate four-inch, as it had; in not having the electric appliance called for in the contract; in failing absolutely to furnish water with which to extinguish the fire and prevent its spreading to other houses. That, as a direct sequence, the fire department of the city and owners of the property were powerless to check the progress of the fire which occurred and was not extinguished through no fault of the owners, and one house followed another in the disastrous conflagration, wholly because of said company's outrageous disregard of its said duty and obligations, its selfish and inexcusable neglect of its plain duty to said property owners, and its wanton disregard of said property rights, resting under its sole protection; and that thereby, plaintiff has been damaged, as aforesaid, by the negligence, wilfulness and wantonness of said defendant in the sum of \$38,810.00, with interest from April 6, 1907, and judgment was asked for said sum.

It is respectfully submitted that the complaint declared the relation between the parties to be that of public duty growing out of contract, and that plaintiff's right of action was for tort for breach of that duty to Spartan Mills by the defendant, because of such relations; and that such relations and such violated duty constituted a cause of action against the defendant company in favor of the insured, to whose rights the plaintiff, as insurer was subrogated, and that his Honor erred in holding in effect that the complaint did not state facts sufficient to constitute a cause of action against the defendant.

16 2. The complaint shows that the plaintiff, as insurer, paid to Spartan Mills, the insured, the amount of its loss; also that the said insured duly assigned and transferred its rights to the plaintiff.

It is respectfully submitted that his Honor erred in holding, in effect, that there was no privity between the plaintiff and the defendant; because of the said assignment and transfer and because of the general rule of law that where the insurer pays to the insured the amount of the loss, insured is subrogated in a corresponding amount to the insured's rights of action against the person or corporation responsible for the loss. The court erred in holding in effect that a subrogation by act of parties, or, because of the general rule of law upon the payment of said loss, gave to the plaintiff herein no right of action against the defendant.

3. That his Honor erred in not holding that the complaint stated a cause of action in favor of the plaintiff against the defendant for said sum of thirty-eight thousand eight hundred and ten dollars,

with interest from April 6, 1907, and in not overruling defendant's demurrer.

4. The court erred in sustaining the demurrer of the defendant to the petition of the plaintiff.

5. The court erred in rendering judgment against this plaintiff upon the sustaining of the demurrer of the defendant.

6. The court rendered judgment against this plaintiff, whereas judgment should have been rendered in favor of the plaintiff and against the defendant.

Wherefore the plaintiff prays that said judgment may be reversed.

GERMAN ALLIANCE INSURANCE
COMPANY,

By WILSON AND OSBORNE, *Attorneys*.

Bond on Appeal.

Filed Dec. 21, 1908.

American Surety Company of New York.

Capital and Surplus, \$5,000,000.00.

Know all men by these presents, that we, German Alliance Insurance Company, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto Home Water
17 Supply Company in the full and just sum of two hundred and fifty dollars to be paid to the said Home Water Supply Company, its certain attorney, executors, administrations, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12 day of December, in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at a term of the Circuit Court of the United States for the District of South Carolina, in a suit pending in said court, between German Alliance Insurance Company, citizen of the State of New York, plaintiff, and Home Water Supply Company, citizen of the State of South Carolina, defendant, a judgment was rendered against the said German Alliance Insurance Company, in favor of said defendant, and the said German Alliance Insurance Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Home Water Supply Company citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond, on the day in the said citation mentioned:

Now, the condition of the above obligation is such, that if the said German Alliance Insurance Company shall prosecute said writ of error to effect, and answer all damages and costs if it fails to make

its plea good, then the above obligation to be void; else to remain in full force and virtue.

AMERICAN SURETY COMPANY OF NEW YORK.

By RICH'D DEMING, *Resident Vice-President.*

[SEAL.]

Attest:

H. H. SIMPKINS,

Resident Assistant Secretary.

GERMAN ALLIANCE INSURANCE COMPANY,

WM. N. KREMER, *President.*

[SEAL.]

Attest:

C. G. SMITH, *Secretary.*

Sealed and delivered in presence of:

— — —

18 STATE OF NEW YORK,
County of New York, ss:

On the 14 day of December, in the year 1908, before me personally came William N. Kremer, to me known, who, being by me duly sworn, did depose and say: that he resided in New York City, that he is the president of German Alliance Insurance Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order.

[SEAL.]

LOUIS A. TRUSLOW,
Notary Public for Kings County.

Certificate filed in New York County.

STATE OF NEW YORK,
County of New York, ss:

On this 12 day of December, 1908, before me personally appeared Richard Deming, Resident Vice-President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and says: that he resides in Ossining, New York; that he is the Resident Vice-President of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said corporation; that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said Richard Deming

further said that he is acquainted with H. H. Simpson, and knows him to be one of the Resident Assistant Secretaries of said corporation; that the signature of said H. H. Simpson subscribed to the said instrument, is in the genuine handwriting of the said H. H. Simpson, and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said Richard Deming, Resident Vice-President.

[SEAL.]

JARED F. HARRISON, JR.,
Notary Public, New York County.

Approved:

WM. H. BRAWLEY,
U. S. Judge.

19

Writ of Error.

UNITED STATES OF AMERICA, 88:

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of South Carolina Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between the German Alliance Insurance Company, citizen of the State of New York, plaintiff, and Home Water Supply Company, citizen of the State of South Carolina, defendant, a manifest error hath happened, to the great damage of the said German Alliance Insurance Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties afore-said in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings afore-said, with all things concerning the same to the United States Circuit Court of Appeals for the Fourth Circuit, together with this writ, so that you have the same at Richmond, on the 13th day of January next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings afore-said being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the 19th day of December, in the year of our Lord one thousand nine hundred and eight.

[SEAL OF COURT.]

C. J. MURPHY,
*Clerk of the Circuit Court of the United States,
District of South Carolina.*

Allowed by:

WM. H. BRAWLEY,
U. S. Judge.

20

*Citation.*UNITED STATES OF AMERICA, *ss.*

The President of the United States to Home Water Supply Company,
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit to be holden at Richmond on the 13th January next pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of South Carolina, wherein the German Alliance Insurance Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Wm. H. Brawley, United States Judge for the District of South Carolina.

This 19th day of Dec., in the year of our Lord, one thousand nine hundred & eight.

WM. H. BRAWLEY,
United States Judge.

Service of this citation by delivery of copy thereof to me at Spartanburg, S. C., admitted this 21st day of Dec., 1908, without prejudice.

RALPH K. CARSON,
Att'y for Defendant.

Filed Dec. 19, 1908.

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

Order to Transmit Record.

And thereupon, it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

[SEAL.]

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

21 & 22

Clerk's Certificate.

The United States of America, District of South Carolina, in the
Circuit Court, Fourth Circuit.

At Law.

I, C. J. Murphy, Clerk of the Circuit Court of the United States for the District of South Carolina, do hereby certify that the fore-

going is a true and correct copy of all the records and proceeding in the case of German Alliance Insurance Company, plaintiff, against Home Water Supply Company, defendant, rendered as aforesaid together with the judgment and all things relating to the same, as appears by the record now on file in my office.

Given under my hand and seal of said court, at Charleston, S. C. in the district aforesaid, this 9th day of January, A. D., 1909.

[SEAL OF COURT.]

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

23 *Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.*

No. 882.

GERMAN ALLIANCE INSURANCE COMPANY, Plaintiff in Error,
vs.

HOME WATER SUPPLY COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the District of South Carolina, at Greenville.

January 11, 1909, transcript of record is filed, and cause docketed.

Same day, appearance of Stanyarne Wilson, Hartwell Cabell, and Wilson & Osborne, for the plaintiff in error, is entered, order filed.

January 22, 1909, appearance of Ralph K. Carson, for the defendant in error, is entered, order filed.

Same day, to-wit: January 22, 1909, twenty copies of the printed record are filed.

24 *Stipulation to Continue Case.*

Filed February 6, 1909.

UNITED STATES OF AMERICA,
District of South Carolina:

In the Circuit Court of Appeals.

#882.

GERMAN ALLIANCE INSURANCE CO., Plaintiff,
vs.

HOME WATER SUPPLY COMPANY, Defendant.

It is stipulated and agreed by counsel hereto that this cause continued until the May Term of this Court, it being impractical to prepare it for presentation at the present term.

Feb'y 5, 1909.

WILSON & OSBORNE,
Attorneys for Plaintiff in Error.
RALPH K. CARSON,
Attorney for Defendant in Error.

March 12, 1909 (February Term, 1909), cause is continued until the May Term, 1909.

June 3, 1909 (May Term, 1909), cause came on to be heard before Pritchard, Circuit Judge, and Waddill and McDowell, District Judges, and is argued by counsel, and submitted.

November 4, 1909 (November Term, 1909), the Court announced and filed its opinion, which is as follows, to-wit:

25

Opinion.

Filed November 4, 1909.

United States Circuit Court of Appeals, Fourth Circuit.

No. 882.

GERMAN ALLIANCE INSURANCE COMPANY, Plaintiff in Error,
versus

HOME WATER SUPPLY COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the District of South Carolina, at Greenville.

[Argued June 3, 1909; Decided November 4, 1909.]

Before Pritchard, Circuit Judge, and Waddill and McDowell, District Judges.

Hartwell Cabell (Wilson and Osborne on the brief) for plaintiff in error; Ralph K. Carson (Kirkland and Smith on the brief) for defendant in error.

McDOWELL, *District Judge*:

This is an action at law, brought by an insurance company against a water company, the complaint being drawn in accordance with the Code of South Carolina. The facts may be very briefly stated. Under a contract between the city of Spartanburg, South Carolina, and a water company (defendant in error) the latter was, as is alleged, required to lay six inch water mains, to place hydrants at certain intervals and to maintain a certain pressure. It is alleged that

26 the water company failed to comply with its contract in the respects above mentioned, and that in consequence a fire, which could have been readily extinguished in its incipency if the contract had been complied with, destroyed a number of houses belonging to the Spartan Mills, a corporation, doing business in Spartanburg, with all of its property in the city and a city tax payer, entitled to protection from fire. The houses had been insured by the plaintiff below (plaintiff in error), and after payment of the losses to the mill company by the insurance company, the former executed a "subrogation receipt" to the insurance company, whereby the rights of the mill company were assigned to the in-

insurance company. A demurrer to the complaint was sustained and the action dismissed.

As no question is made as to the right of the insurance company to maintain an action where a property owner could maintain, we shall consider only the alleged liability to the property owner. It should also be stated that we have here no contract between the water company and the property owner, and neither ordinance nor provision in the contract between the city and the water company to the effect that the water company shall be liable to the property owners.

In considering the question of the alleged liability of the water company to the property owner, it will tend to clearness of thought to first consider the action at bar as being *ex contractu*, founded expressly on breach of contract. The property owner is not a party to the contract, and it is conceded that the city does not owe him the duty of furnishing water. The benefit to him is clearly not a direct benefit. A mere supply of water, adequate in amount and under full pressure, would not of itself avail him anything. It seems to us that the overwhelming array of authority denying liability must be held sound in result on the accepted principles of the law of contract. The argument that the city acts as the agent of the property owners in making such contracts does not seem to us to be sound. The city is in some sense the agent of the citizens in the aggregate. It is not the agent of the citizens separately and individually. The theory if carried to its logical conclusion would result in intolerable conditions, and is subversive of thoroughly established principles. No further weight seems to us to be given the argument in behalf of the property owner by the fact that the consideration for the water company's agreement comes in large measure from the property owners. The connection is too remote. The water company, in case of default in payment by the city must sue the city and for it to collect from the citizens. The water company cannot sue the individual citizen.

27 For rulings in favor of the right of recovery see *Paducah Lumber Co. v. Paducah Water Co.*, 89 Ky., 340; 25 Am. St. Rep., 536 (which has been followed by some subsequent cases in Kentucky); *Gorrell v. Water Co.*, 124 N. C., 328, 70 Am. St. Rep. 598 (which was followed in *Fisher v. Supply Co.*, 128 N. C., 37, 38 S. E., 914); *Planters Oil Mill v. Monroe Water Works*, 52 L. Ann., 1243; *Mugge v. Tampa Co. (Fla.)*, 42 So., 81, 6 L. R. A. (n. s.), 1171. We are also referred to *Crone v. Stinde*, 156 Mo. 262, which we have not been able to see, but which is said to intimate that *Howman v. Trenton Co.*, 119 Mo., 304, 41 Am. St. Rep. 654, and *Phoenix Insc. Co. v. Trenton Company*, 42 Mo. App., 113 are unsound.

A sufficient number of the decisions against the right of recovery are found in *Lovejoy v. Bessemer Co.*, 146 Ala., 374, 41 So., 76, 6 L. R. A. (n. s.), 429; 1 *Farnham on Waters*, sec. 160*b*; 30 Am. Eng. Ency. (2d ed.), 429 et seq. See also *Ancrum v. Camden Co.*, 82 S. C.

Can a right of action be maintained on the theory that this is an action in tort?

Having reached the conclusion that the property owner has no right of action *ex contractu*, it would seem to follow that no liability in tort can exist, because the assumed duty arises only from a contract by which the plaintiff is not given any right of action. However, the opinion in *Guardian Trust Co. v. Fisher*, 200 U. S., 57, seems to us to call for the discussion which follows, especially in view of the following:

"* * * if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the citizens, and if they avail themselves of its conveniences and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for tort."

The first inquiry of course is, whether or not the Supreme Court, in the case above mentioned, has rendered a binding decision on the

28 right of the property owner to recover from a water company under the circumstances alleged in the case at bar. We are

of opinion that the court did not in that case decide this question. In that case the Supreme Court did decide that the judgment in the state court was a judgment in tort and also that the effect of sec. 1255 N. C. Code, 1883, was to make a judgment in tort against the successor in interest of a corporation mortgagor as effective as such a judgment against the mortgagor. In the opinion it is said:

"The statute subordinates the mortgage to judgments for torts. Now what is the judgment? It is a determination that upon the facts stated the plaintiff is entitled to recover so much money. It may not be essential that it recite whether the facts stated show a breach of contract or a tort, but it is essential that the judgment should be considered as a determination that upon those facts the plaintiff is entitled to recover. And it must be assumed that under the statute the mortgagee and the bondholders it represents agree to accept the judgment as conclusive in this respect, or if not conclusive, at least *prima facie* evidence."

We have therefore a case in which the mortgagee had in effect contracted that its property, so to speak, should be bound by any judgment obtained without fraud against the mortgagor (or its successor), if the judgment were in tort. It follows that the character of the judgment obtained by Fisher in the state court was the only question presented to and decided by the Supreme Court. In other words, the question before the court was this: It being conceded in effect that Fisher had a right of action against the Supply Company, can this right of action be properly classed as sounding in tort? It is also to be remembered that the judgment in *Fisher v. Supply Company* came from North Carolina, one of the few states holding that there is privity of contract between the water company and the prop-

erty owner. (*Gorrell v. Water Co.*, 124 N. C., 328, 70 Am. St. Rep., 598.) Such being the fact, there being a conclusively adindicated privity of contract and a liability *ex contractu*, the ruling that there is a liability in tort for neglect in the performance of the contract is simply affirmatory of all of the large class of cases illustrated by the liability in tort of a common carrier to its passengers.

The question before us is therefore not settled by *Guardian Trust Co. v. Fisher*, *supra*; but in view of what is there said some discussion of the question is necessary.

It can only tend to clearness of thought to lay out of consideration at the outset that large class of cases in tort in which there is
 29 a direct contractual relation between the plaintiff and the defendant; such as the liability in tort of a common carrier to its passenger, including the "invitation to alight" cases: of the blacksmith to his customer, where the blacksmith by incompetence or negligence lames the horse; of the attorney to his client; and of the physician to his patient, where the contract of employment is made by the patient. In all such cases there is a relation between the plaintiff and defendant such as does not exist here—a clear privity of contract.

It will also tend to clearness to lay aside those cases in which liability in tort arises from a violation of statute or lawful ordinance by the defendant. For instance, cases in which the plaintiff is injured at a public crossing by the failure of a railway company's servants to sound warnings or to check the speed of the train, in violation of statutes or ordinances. In such cases there is no contract relation at all, but the duty owing by the defendant to the plaintiff is more readily referable to the statute or the ordinance than to the common law duty.

Cases in which there is no statute or ordinance governing the duty of a railway company at public crossings will be considered later on. And it may not be amiss to here call attention to the fact that in such cases the complaint is of a misfeasance, while in the case at bar the complaint is for what is to be classed as a non-feasance.

Can it be said that the defendant here has entered upon the performance of a public duty? If so, there is a liability in tort to the property owner specially injured by neglect in the performance of such duty.

We are cited to *Robinson v. Chamberlain*, 34 N. Y., 389, and *Fulton Insc. Co. v. Baldwin*, 37 N. Y., 648. In the first of these cases the defendant had contracted with the state keep in repair the locks on certain sections of the Erie Canal, and it was held that, "a public officer, or a contractor engaged to perform the duties of a public officer, is liable for negligence or malfeasance to any one sustaining special damage in consequence thereof." In the *Baldwin* case the defendant had contracted to keep a section of the canal free from obstructions and was held liable to an insurance company which had paid losses to the owner of a canal boat sunk by reason of a snag negligently left in the canal by the contractor. In *Robinson v. Chamberlain*, *supra*, it is said:

"The only question in this case is, whether an action will lie

against a contractor, employed by the State, pursuant to law, to keep a portion of the canals in proper condition and repair, who
 30 neglects his duty, whereby the plaintiff sustains special damage.

"It is a familiar doctrine, that, 'when a corporation or individual is bound to repair a public highway or navigable river, they are liable to indictment for the neglect of their duty' (Per Nelson, J., in the *People v. The Corporation of Albany*, 11 Wend., 539).

"A navigable river is a public highway; our canals, open and free to all for navigation, upon payment of the toll fixed by law, as our turnpikes are, for travel upon like terms, are, I think, in every sense, public highways.

"A failure to keep a public highway in repair by those who have assumed that duty from the State, so that it is unsafe to travel over, is a public nuisance, making the party bound to repair liable to indictment for the nuisance, and to an action at the suit of any one who has sustained special damage."

In the cases above mentioned there are features which distinguish them from the case at bar. In them the contract serves no necessary purpose other than to identify the person who should perform the duty. The duty is created by law; existed before the contract was made; an indictment lies for failure to perform it; and the public is the direct, and the state the indirect, beneficiary. In the case at bar the duty, if it exists, did not exist until the contract was made; the contract alone furnishes the measure of the duty; no indictment lies for failure to comply with the contract, and the city is the direct beneficiary, while the property owner is only indirectly and incidentally benefited. We have said that the contract alone creates the duty, if it exists. This is true because it is universally conceded that the city owes no duty to its property owners to establish water works, and if the city does establish such works, it is not liable to its property owners for neglect in operation. *U. S. v. Sault Ste. Marie*, 137 Fed., 258; 2 Dill. Municip. Corps., sec. 975; 28 Cyc., 1303; *Boston Co. v. Salem*, 94 Fed., 238; *Metropolitan Co. v. Topeka Co.*, 132 Fed., 702, 704. We have said that the contract alone furnishes the measure of duty, if it exists. In a case such as we have here it would be clearly erroneous to say that the duty is to lay reasonably large mains, to install hydrants at reasonable intervals and to maintain a reasonable, or a reasonably adequate, pressure. Such requirements may exceed the requirements of the contract. Consequently if a duty to the property owner exists, it is a duty to use care to perform the contract. No indictment lies for failure to perform the
 31 contract, because such breach of contract is neither a crime nor a misdemeanor. The remaining distinction is obvious without elaboration. In a contract to perform a true public duty the citizen is benefited directly. In the case at bar the property owners are indirectly benefited, and only then in the event that the city properly utilizes the water supplied by the water company.

It would seem therefore that we could not consider the defendant here as having entered upon the performance of a public duty, even if the contract itself did not negative such hypothesis.

In so far as the expression "public calling" conveys any meaning other than that implied in the term "public duty," it may here be said that it seems to us that the defendant here has not undertaken a public calling. The contract restricts its calling, in respect to supplying water for combating fire, to that of supplying the city. The defendant distinctly has not entered upon the calling of supplying water, for fire purposes, to the public. In the sense that a public calling is one that brings the one following the calling into contact with the public, in the sense that the calling is such that the public has an interest (even an indirect interest) in the manner in which it is carried on, the defendant has entered upon a public calling. But the question remains whether this particular public calling is such that a liability in tort to the public arises for acts of non-feasance.

Let us now consider some cases of liability in tort where there is no contract, or in which the contract can be disregarded. Such cases may be illustrated as follows: Where a surgeon is employed by the father of the patient (*Gladwell v. Stiggall*, 5 Bing. N. C., 733, 35 E. C. L., 393), or by the husband (*Pippin v. Sheppard*, 11 Price, 400) of the patient, and is liable in tort at the suit of the patient for malpractice or neglect; or where the physician is employed by the county authorities to attend charity patients at the almshouse (*Du-Bois v. Decker*, 130 N. Y., 325, 29 N. E., 313,) and is liable in tort to a charity patient for incompetence or neglect; where a manufacturing pharmacist negligently labels a poison as a harmless drug and is held liable in tort to one who is thereby injured and to whom it was administered by a remote vendee (*Thomas v. Winchester*, 6 N. Y., 397, 57 Am. Dec., 455), and the case of a railway company injuring a person at a crossing by neglect, in the absence of statute or ordinance (23 Am. & Eng. Ency. (2d ed.), 756), or where it is held liable notwithstanding compliance with an ordinance (*Grand Trunk R. Co. v. Ives*, 144 U. S., 408).

32 The most noticeable feature of these cases, which is common to all of them, is the danger to the public from neglect by the defendant. In each of these cases we may with some propriety say that the defendant had entered upon a "dangerous calling." See also *Oil Co. v. Deselmos*, 212 U. S., 159, 178—an excellent illustration of a dangerous calling.

In considering whether or not the water company has entered upon a calling to be properly classed as "dangerous," we are confronted by some differences between the cases instanced above and the case at bar.

There is in marked degree a helplessness on the part of the physician's patient, of the one who takes a mislabelled drug, and of the traveller on a level crossing, which is far from being so noticeable in the case of the property owner. He still has fire insurance, chemical extinguishers, and the same crude methods of combating fires in their incipency that he had before the city water plant came into existence.

If the danger of neglect in water company cases were so imminent as in the cases above mentioned, in view of the length of time that

water companies have been in existence, we should have a "cloud" of decisions asserting liability in tort to property owners on the ground of "dangerous calling," whereas the absence of authority for taking such position is most marked.

If neglect by a water company in respect to supplying water for combatting fire is so dangerous to the public that the company must be held to have entered upon a "dangerous calling," it would seem that the courts would long since have swept away the defense on the part of the city (furnishing water for fire purposes) that it is performing a governmental function. "Salus populi suprema lex." The very fact that such defense is so universally held good, seems to us a strong argument for holding that the danger to the public from neglect in supplying water for fire purposes is not so imminent or so extreme as to justify the courts in classifying the calling as "dangerous." The citizens had no right of action when the city was doing itself what it has since engaged the water company to do, and they are in no worse plight now. No very good reason suggests itself for holding that danger to the public becomes suddenly the dominant feature of the calling, because a private person or corporation has undertaken it.

There remains a further distinction between the case at bar and the "dangerous calling" cases. In the latter the duty is independent of contract. In the case at bar, if the duty exists, it is created by and originates in a contract made with some one other than the plaintiff, and is so entirely measured by the contract that the supposed duty is simply to perform the contract.

In *Longmeid v. Holliday*, 6 E. L. & E., 562, 6 Exchq., 761, Baron Parke said: "There are other cases, no doubt, besides that of fraud, in which a third person, although not a party to the contract, may sue for damage sustained by him if it be broken. These cases occur where there is a wrong done to a person for which he could have a right of action, although no such contract had been made; * * *"

The very fact that the duty, if it exists, originates in, and is only to be measured by, the contract, forbids the conclusion that the duty arises in behalf of any one not in sufficient privity with the contractor to maintain an action *ex contractu*. In other words, the want of privity which denies to the plaintiff a right of action *ex contractu*, forbids a finding that a duty to the plaintiff is created by the contract.

A difference between the case at bar and the admitted liability in tort of a water company which, for instance, leaves a trench open in a street without lights, is found in the respect last above mentioned: In leaving a trench open, the duty to the person injured thereby does not originate in and is not measured by the contract between the city and the water company. The duty exists independently of and without reference to the contract. And this difference exists without reference to the further fact that in the case supposed the act complained of is in a sense affirmative, a misfeasance; while in the case at bar the act is negative, a non-feasance.

Let us now mention a few decided cases, generally accepted as

sound, which seem to us to afford precedents for denying the existence of a right of action in tort in the plaintiff here.

In *Savings Bank v. Ward*, 100 U. S., 195, an attorney at law, employed and paid solely by his client and without knowledge as to the purpose for which it was obtained, gave to his client an opinion on the title of real estate which the attorney supposed belonged to his client, to the effect that the title was good and the property unencumbered. The client had previously conveyed the property to another and this conveyance although on record was overlooked by reason of the negligence of the attorney. The client used the opinion and thereby obtained a loan from the bank, mortgaging the real estate as security therefor. By reason of the unreported conveyance the bank lost the loan and thereupon sued the attorney. The court, although not unanimously, held that the attorney was not liable to the bank.

In *Winterbottom v. Wright*, 10 Mees. & W., 109, it was held that the driver employed by the owners of a coach line could not
34 maintain an action in tort against the builder of the coach, whose negligence in the construction of the coach caused an injury to the plaintiff.

In *Longmeid & wife v. Holliday*, 6 Eng. Law & Equity Repts., 562, 6 Exchq., 761, A. sold a lamp manufactured by A. to B. and by reason of negligence in the construction of the lamp B.'s wife was injured. It was held that an action in tort by the wife against A. did not lie.

It cannot be denied that an attorney who prepares an opinion on title must know that it may be used to the injury of some one or more of the public; the coach builder must know that negligence in the construction of a coach especially if it is to be used in public service may result in death or injury to some of the public; the manufacturer of lamps must know that a lamp sold by him is likely to be used by others than his immediate purchaser, and that negligence in construction is to such extent dangerous to the public. And yet in these cases liability in tort was denied. A duty to the plaintiff was in each case held not to have existed, and in each case the plaintiff was injured as the result of a breach by the defendant of a contract with a third party.

We do not think it necessary to discuss at length the liability of a water company in case it were under no contract to supply water for fire purposes, but nevertheless undertakes to do so. (200 U. S., 69.) We have no such case here, but still it seems not improper to say that in our opinion there would be no liability in tort to the property owner unless there were also a liability *ex contractu* upon an implied agreement between the company and the property owner. If the consideration was paid by the city, and not directly by certain property owners, it would assuredly prevent the implication of an agreement between the water company and the individual property owners. And inability to maintain an action *ex contractu* on the part of the property owner would defeat his right to maintain an action *ex delicto*. If the water company were to collect from certain property owners direct, it is inconceivable that there should not be first an

agreement at least as to the amount to be charged, and an implied promise to render some ascertainable service to the property owners paying therefor. No such case is likely to arise; but if it should it would be so unlike the case at bar as to afford us no aid in reaching a proper conclusion.

Among the water company cases in which the question of liability in tort to the property owner was considered and denied may be mentioned: *Nickerson v. Bridgeport Co.*, 46 Conn., 24, 33 Am. 35 & 36 Rep., 1, 5; *Foster v. Lookout Co.*, 2 Lea, 42 (see note 33 Am. Rep., 8); *Fowler v. Athens Co.*, 83 Ga., 219, 20 Am. St. Rep., 313, 315, 9 S. E., 673; *Nichol v. Huntington Co.*, 53 West Va., 384, 44 S. E., 290; *Britton v. Green Bay Co.*, 81 Wis., 48, 29 Am. St. Rep., 856, 51 N. W., 84; *House v. Houston Co.*, 88 Tex., 233, 28 L. R. A., 532; 31 S. W., 179; *Ancrum v. Camden Co.*, 82 S. C., —; *Fitch v. Seymour Co.*, 139 Ind., 214, 47 Am. St. Rep., 258; 37 N. E., 982.

In *Ancrum v. Camden Co.*, supra, a suggestion is made which is well worthy of consideration:

"For the attainment of these municipal ends the city has the right to pay out public funds. It may well be doubted whether it has the right to apply public funds to the larger compensation which a water company of necessity must charge for the enormous peril of having to pay for all private property lost by its negligence. Such expenditure of municipal funds raised by taxation of all property would be an unjust discrimination in favor of those whose property is exposed to fire loss, and against those whose property is not subject to that peril. There is at least a strong presumption against a municipality undertaking to pay for such indemnity from the public revenue."

Our conclusion is that the judgment below must be Affirmed.

37 November 10, 1909 (Same Term), the Court made and entered the following judgment, to-wit:

Judgment.

Filed and Entered November 10, 1909.

United States Circuit Court of Appeals, Fourth Circuit.

No. 882.

GERMAN ALLIANCE INSURANCE COMPANY, Plaintiff in Error,

vs.

HOME WATER SUPPLY COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the District of South Carolina.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby affirmed, with costs.

J. C. PRITCHARD.

Nov. 10, 1909.

38 And on another day, to-wit: December 1, 1909, the mandate of this court is issued and transmitted to the said Circuit Court at Greenville, S. C., in due form.

Clerk's Certificate.

UNITED STATES OF AMERICA,

Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 12th day of February, A. D., 1910.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,

Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

39 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which German Alliance Insurance Company is plaintiff in error, and Home Water Supply Company is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the District of South Carolina, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified

40 by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of April, in the year of our Lord one thousand nine hundred and ten.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

41 [Endorsed:] File No. 22069. Supreme Court of the United States, No. 843, October Term, 1909. German Alliance Insurance Company vs. Home Water Supply Company. Writ of Certiorari. The execution of the within writ appears from the schedules hereunto annexed. Henry T. Meloney, Cl'k, U. S. Cir Court — Appeals, 4th Circuit.

42 United States Circuit Court of Appeals, Fourth Circuit.

No. 882.

GERMAN ALLIANCE INSURANCE COMPANY, Plaintiff in Error,
vs.
HOME WATER SUPPLY COMPANY, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed that the Transcript of the Record in the above entitled cause heretofore filed in the Supreme Court of the United States with the application for Writ of Certiorari, may be taken as a return to the writ and that no new Transcript be made.

HARTWELL CABELL,

Counsel for Plaintiff in Error.

RALPH K. CARSON,

Counsel for Defendant in Error.

Entered into this 14th day of April, 1910.

UNITED STATES OF AMERICA, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing stipulation of counsel is a true copy of the original filed April 15, 1910, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals, at Richmond, this 16th day of April, A. D., 1910.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,

Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

43 United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return to the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 12th day of April, 1910, by annexing hereto a certified copy of the stipulation of the attorneys of rec-

ord that the transcript of the record in the above entitled cause heretofore filed in the Supreme Court of the United States with the application for a writ of certiorari, may be taken as a return to the writ and that no new transcript be made.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals, at Richmond, on this 16th day of April, A. D., 1910.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,

Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

44 [Endorsed:] File No. 22,069. Supreme Court U. S. October Term, 1909. Term No. 843. German Alliance Insurance Co., Petitioner, vs. Home Water Supply Co. Writ of Certiorari and Return. Filed April 18, 1910.

Office Supreme Court, U. S.

FILED.

MAR 19 1910

JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1909.

GERMAN ALLIANCE INSURANCE
COMPANY,
Petitioner,

VS.

HOME WATER SUPPLY COM-
PANY,
Respondent.

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSO-
CIATE JUSTICES OF THE SUPREME COURT OF THE
UNITED STATES:

The petition of the German Alliance Insurance Company respectfully shows to this Honorable Court as follows:

The German Alliance Insurance Company, a corporation and citizen of New York, as subrogee to the rights of Spartan Mills, a corporation, seeks in this action to recover damages against Home Water Supply Co., a corporation and citizen of South Carolina, for negligence and misfeasance in the furnishing of water for general fire purposes, under a contract with the City of Spartanberg, South Carolina.

The action was brought in the Circuit Court for the District of South Carolina, the jurisdiction of

which court was based on diverse citizenship. The complaint (transcript 2) alleged:

The ownership by Spartan Mills of the property destroyed, and its location to be in the City of Spartanberg; the issue to the owner for valuable consideration by German Alliance Insurance Company of a policy of insurance against loss or damage by fire with respect to said property.

That during the life of the policy a fire occurred which destroyed the greater portion of the property insured, the loss being adjusted between the insurance company and Spartan Mills at the sum of \$38,810, which sum, less one per cent. discount for a payment in advance of maturity, was paid to Spartan Mills by German Alliance Company. The fire is alleged to have occurred in March, and the loss to have been adjusted and paid in April, 1907.

That in February, 1900, the City Council of Spartanberg had entered into a contract with the Home Water Supply Company, whereby the latter undertook to furnish adequate water protection to the property of the residents of Spartanberg for a period of thirty-three years from said date; that, among other things, it was in said contract provided that the water company should establish all mains necessary for the distribution of water throughout the city, being given the privilege of crossing the streets of the city for the purpose of laying such pipes, conduits or aqueducts as might be necessary for the proper distribution of water throughout the city so as to effect the most adequate supply for domestic use and greatest protection against fire; that when mains were put in for city fire protection, they were not to be less than six inches in diameter, unless permission were granted by the City Council.

That it was further provided in said contract that the Water Company should constantly, night and day, except in the case of unavoidable accident, keep all the hydrants supplied with water for fire protection; that it should keep them in good order

and efficiency for such service, and should always maintain a height of at least seventy feet of water in the standpipe or water-tower, except in case of unavoidable accident, or when water should be drawn off for the clearing of the same, or for any cause which could not be controlled by said Water Company.

That the contract further provided that the City might, at any time, require the Water Company to make extensions of its system of mains by giving sixty days' notice to said company, and might order hydrants placed on such extensions at the rate of not less than ten to the mile; and that the Water Company should install a patent electrical apparatus for opening or shutting the valve or gate between the standpipe or water-tower and its system of mains, so that, in case of necessity, and should more pressure be required than that afforded by the water-tower, the engineer could pump directly into the mains, thereby giving any pressure required.

That in the years 1905 and 1906 the City Council of Spartanburg had, in accordance with the provisions of said contract, directed and ordered the Water Company to put in certain hydrants with connecting pipe, which order, if obeyed, would have carried fire protection to within about two hundred feet of the first of the buildings belonging to Spartan Mills that caught fire in March, 1907; that this order had been disregarded, and on the day of the fire the nearest hydrant to the said building which first caught fire was about six hundred and fifty feet away.

The complaint further alleged that the water company had disregarded its contract in that it had failed to install the patent electrical appliance for shutting off the water-tower and obtaining increased pressure by pumping directly into the mains; that it had further disregarded its contract by using four-inch pipe instead of six-inch pipe in the mains for supplying fire hydrants contiguous to the property destroyed, and that furthermore, on

the day of said fire, the pressure of water in the tower was far less than the contract called for. The complaint alleges, in conclusion, that as a direct consequence of the negligence and malfeasance in the performance of its contract in these several regards by the water company, the Fire Department of the City of Spartanberg and the owners of the property were powerless to check the progress of the fire which had commenced through no fault of the owner; and that one house after another was destroyed in the conflagration which ensued from lack of water with which to extinguish the flames.

The resultant damage from the neglect and malfeasance of the water company, is placed at the amount of loss by fire to the Spartan Mills which the German Alliance Insurance Company was compelled to pay under its policy, and judgment is asked in that amount against the Water Company.

The Home Water Supply Company demurred to the complaint upon the following grounds (Transcript 10):

(a) That the complaint does not state facts sufficient to constitute a cause of action.

(b) That the complaint fails to state a cause of action in favor of the plaintiff against the defendant.

(c) That no privity of contract is shown between plaintiff and defendant.

(d) Because the alleged failure of the defendant to lay water mains would not give the plaintiff or Spartan Mills a right of action against the defendant.

(e) Because a taxpayer or its assignee would have no right of action against the defendant for failure to obey the said ordinance, or for violation of, or failure to perform the contract made by the defendant with the City of Spartanberg.

The Circuit Court sustained this demurrer and ordered the complaint dismissed (Transcript 11). No opinion was handed down. The case was taken to the U. S. Circuit Court of Appeals for the 4th Circuit upon error (Transcript 11).

The specifications of error (Transcript 14) set forth at some length the several grounds upon which the German Alliance Insurance Company claimed that the action of the Circuit Court in sustaining the demurrer and dismissing its complaint, was erroneous; but they may be summarized under the single proposition that the complaint as a matter of law stated a cause of action and, therefore, should not have been dismissed.

The Circuit Court of Appeals sustained the judgment of the Court below in dismissing the complaint, holding in substance that no action will lie either on contract or in tort against private water companies for damages sustained by inhabitants of municipalities (Opinion, Transcript 25 *et seq.*)

Your petitioner insists that this action on the part of the Circuit Court of Appeals was erroneous and in direct conflict with the law as determined heretofore by the judgment and decision of this Court. In *Guardian Trust & Deposit Company v. Fisher*, reported in 200 U. S., 57, this Court decided the questions of law raised by the demurrer in this case in favor of the contention of this petitioner.

Your petitioner has no right of appeal or writ of error herein to this Honorable Court, because the jurisdiction of the Circuit Court depended entirely on diverse citizenship.

Your petitioner presents herewith as a part of this petition a brief showing more fully its views upon the question involved and a transcript of the record in the Circuit Court of Appeals. WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the 4th Circuit, commanding such court to certify and send to this Court, on a day certain

to be therein designated, a full and complete transcript of the record and all the proceedings of the said Circuit Court of Appeals in the said case therein entitled "German Alliance Insurance Company, Plaintiff in Error *vs.* Home Water Supply Company, Defendant in Error, No. 882," to the end that the said case may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled "AN ACT TO ESTABLISH CIRCUIT COURTS OF APPEALS AND TO DEFINE AND REGULATE IN CERTAIN CASES THE JURISDICTION OF THE COURTS OF THE UNITED STATES, AND FOR OTHER PURPOSES," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act, and that the said judgment of the Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

THE GERMAN ALLIANCE INSURANCE CO.,

By HARTWELL CABELL,
Counsel.

UNITED STATES OF AMERICA, }
 Southern District of New York, } ss.:
 County and State of New York. }

WILLIAM N. KREMER, being first duly sworn, states that he is the president of the above named petitioner, the German Alliance Insurance Company, and as such president has full knowledge of its business affairs and particular knowledge of the matters and things set forth in the above petition, and of the conduct and proceedings in the above entitled action; that he has read the foregoing petition subscribed by him and knows the contents thereof, and that the facts therein stated are true.

Subscribed and sworn to before me }
 this 11th day of March, 1910. } *William N. Kremer*
James Reed
 [SEAL.] Notary Public,
 New York Co.

I hereby certify that I have examined the foregoing petition, and that in my opinion the petition is well founded as to the matters of facts and as to the matters of law, and that the case identified thereby is one and is such that the prayer of the petition should be granted by this Honorable Court.

Marshall C. Bell

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No. 282

Office Supreme Court
MAR 19 1909
JAMES H. MCKENNEY

Supreme Court of the United States.

OCTOBER TERM, 1909.

GERMAN ALLIANCE INSURANCE COMPANY,

Petitioner,

vs.

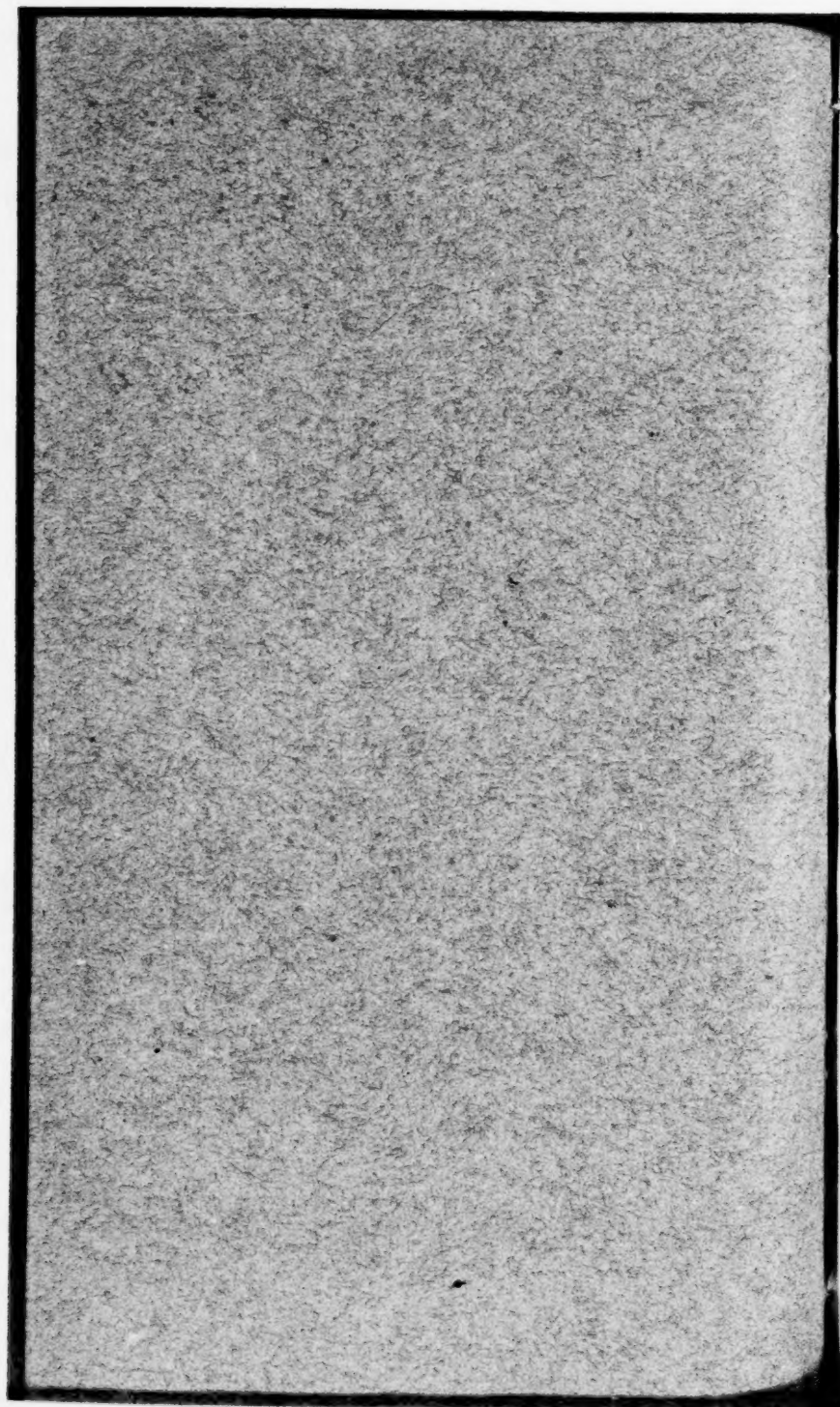
HOME WATER SUPPLY COMPANY,

Respondent.

BRIEF FOR PETITIONER.

HARTWELL CABELL,

Counsel for Petitioner, GERMAN ALLIANCE
INSURANCE COMPANY.



Supreme Court of the United States.

OCTOBER TERM, 1909.

GERMAN ALLIANCE INSURANCE
COMPANY,
Petitioner,

VS.

HOME WATER SUPPLY COM-
PANY,
Respondent.

BRIEF FOR PETITIONER.

Statement.

The German Alliance Insurance Company (petitioner herein) commenced an action against the Home Water Supply Company (respondent herein) in the United States Circuit Court in and for the District of South Carolina on May 7th, 1907.

The action was to recover damages for the destruction of certain property by fire, belonging to plaintiff's subrogor and located in Spartanburg, South Carolina, caused by the negligence and misfeasance of defendant.

The allegations of the complaint in this action appear in full in the printed transcript (p. 2) and are substantially set forth in the petition herein.

To this complaint, defendant interposed a demurrer which raised the issue whether the allegations of the complaint constituted a cause of action.

This demurrer was sustained by the Circuit Court, no opinion being rendered, and judgment was entered dismissing the complaint.

The case was taken on error to the Circuit Court of Appeals for the Fourth Circuit, which court affirmed the judgment of the court below, in an opinion delivered by McDowell, J., copy of which appears in the printed transcript (p. 25 *et seq.*).

Argument.

The sole question involved in the case at bar, whether an action in tort will lie against a private water company for negligence or wilful misfeasance in failing to supply a municipality and its inhabitants with sufficient water for fire purposes, where it has contracted with the municipality for such supply and has entered into the performance of the contract.

During the last half century, repeated attempts have been made by individuals who have lost their property through fires which could have been extinguished with an adequate water supply, to hold this class of quasi public corporations responsible for their shortcomings. Actions have been brought both on contract and in tort; and the questions involved have been exhaustively discussed by the bench, at the bar, and by text writers. In some jurisdictions, citizens have been allowed to recover sometimes on the theory of breach of contract, sometimes as for a tort; in others, courts have refused to permit a recovery upon either form of action. The cases are irreconcilable, and the differences in the opinions expressed by the many judges who have dealt with the subject, are as numerous almost as the judges expressing them. Recoveries on contract have been denied for want of privity and permitted because of privity. Recoveries

tort have been denied because the injury was declared to be *damnum absque injuria*; because it was held that *tort* would not lie where contract would not lie, and for numerous other and equally learned and ingenious reasons. On the other hand, recoveries in tort have been allowed and the application of the doctrine of *damnum absque injuria* denied; and courts have insisted that an action in tort could be sustained where no cause of action upon a contract existed.

It is not the intention of counsel to burden this Court with a review of these numerous authorities, or with a critical and extended discussion of the correctness or incorrectness of the conclusion reached by the Court below in holding that in this effort to recover for the admitted negligence of the defendant, no action will lie either in tort or on contract. This petition is presented here in the belief that this Court, by its decision in *Guardian Trust Co. vs. Fisher* (200 U. S., 57), has declared itself to be in accord with those authorities who hold that an action in tort will lie against a water company, through whose negligence or wilful misfeasance private property has been destroyed by fire; that that decision is binding upon the lower Federal courts; and that the refusal of the Circuit Court of Appeals of the Fourth Circuit to follow it in deciding this case, calls for the exercise of the power vested in this court to bring before it for review, decisions of the lower courts which would otherwise be final.

The argument will therefore be confined to a consideration of *Guardian Trust Co. vs. Fisher*, and an ascertainment of what questions were before this Court for decision in that case, and how they were decided.

A brief review of the various steps in the litigation which culminated in the decision of this Court in *Guardian Trust Co. vs. Fisher*, will be necessary. A private water company under contract with a municipality, having constructed its plant, executed

a mortgage upon its property to secure an issue of bonds. A subsequent mortgage was made which was afterwards foreclosed and the property sold to a new corporation, subject, however, to the lien of the first mortgage. Thereafter, the new corporation executed a further mortgage, covering the same property. Subsequently, and while the plant was being operated by the second company, a fire occurred which destroyed certain property located within the municipality.

Fisher, the owner of this property, sued the second water company in the courts of North Carolina for damages, alleging negligence on the part of the company in its failure to supply sufficient water to extinguish the fire. By special verdict the jury found the several issues of negligence, &c., in favor of the plaintiff.

Pending this action, the trustees under the existing corporation mortgages brought foreclosure proceedings in the United States Circuit Court; the property of the water company was sold under decree of that court, and the resulting fund paid into court for distribution.

Sec. 1255 of the North Carolina Code (1883) gives a judgment creditor where the judgment is given for a tort a priority over bondholders secured by a mortgage upon corporate property; and in order to avail himself of this statutory preference, Fisher insisted that the judgment entry in the State court should show on its face that the judgment was *for a tort*. The trial Court refused to make such entry, and the case was taken to the Supreme Court of the State, where the lower court was reversed and the cause remanded, and under instructions, the judgment was framed to recite that the recovery was "*for the tortious injury and damage done by the negligence of the defendant*" (*Fisher vs. Greensboro Water Supply Co.*, 128 N. C., 375).

To the action in the State court, neither the trustees under the mortgages covering the property of the defendant company, nor the bondholders, were

parties, and the Supreme Court of North Carolina refused to pass upon the question of plaintiff's right to a preference under Sec. 1255 *on the ground that the question was not before them.*

Fisher then intervened in the proceedings in the Federal court, set up his judgment and claimed a preference under the section of the North Carolina Code referred to. The Circuit Court allowed the priority of his lien over the claims of the bondholders under both mortgages, and its decree was sustained by this Court, to which the case was finally brought by writ of *certiorari* (*Guardian Trust Co. vs. Fisher*, 200 U. S., 57).

It was upon the theory that the only question before the Supreme Court was whether the judgment of the North Carolina court was *in tort*, and that this Court did not have before it the question whether, upon the facts found by the jury, a tort was shown to have been committed, that the Circuit Court of Appeals declared that the judgment in *Trust Co. v. Fisher* was not decisive upon the question involved in the case at bar. It therefore considered itself at liberty to disregard the language of Mr. Justice Brewer, in which, after reciting the conclusion of the State court, the learned Justice continues:

“ From the conclusion thus reached we are not inclined to dissent, and for these reasons. One may acquire by contract an opportunity for acts and conduct in which parties other than those with whom he contracts are interested, and for negligence in which he is liable in damages to such parties. * * * Pollock, in his treatise, groups torts into three classes, in the last of which he specifies ‘breach of absolute duties specially attached to the occupation of fixed property, to the ownership and custody of dangerous things, and to the exercise of certain public callings’ (*Webb’s Pollock on Torts*, 7). This, it is said, implies the existence of some absolute duty

not arising from personal contract with the other party to the action.

And here we are met with the contention that, independently of contract, there is no duty on the part of the water company to furnish an adequate supply of water; that the city owes no such duty to the citizen, and that contracting with a company to supply water imposes upon the company no higher duty than the city itself owed, and confers upon the citizen no greater right against the company than it had against the city; that the matter is solely one of contract between the city and the company, for any breach of which the only right of action is one *ex contractu* on the part of the city. It is true that a company contracting with a city to construct water works and supply water may fail to commence performance. Its contractual obligations are then with the city only, which may recover damages, but merely for breach of contract. There would be no tort, no negligence, in the total failure on the part of the company. It may also be true that no citizen is a party to such a contract, and has no contractual or other right to recover for the failure of the company to act, but if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the citizens, and if they avail themselves of its conveniences, and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of the obligations imposed by its charter, or by contract with the city, which may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for tort. 'The fact that a wrongful act is a breach of contract between the wrongdoer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby.' *Osborne v. Morgan* (130 Massachusetts, 102, 104). See also *Emmons v. Alvord* (177 Massachusetts, 466, 470). An

individual may be under no obligation to do a particular thing, and his failure to act creates no liability, but if he voluntarily attempts to act and do the particular thing, he comes under an implied obligation in respect to the manner in which he does it. A surgeon, for instance, may be under no obligation in the absence of contract, to assume the treatment of an injured person, but if he does undertake such treatment he assumes likewise the duty of reasonable care in such treatment. The owner of a lot is not bound to build a house or store thereon, but if he does so he comes under an implied obligation to use reasonable care in the work to prevent injury therefrom to others (*Holmes on the Common Law*, 278). Even if the water company was under no contract obligations to construct water works in the city or to supply the citizens with water, yet having undertaken to do so, it comes under an implied obligation to use reasonable care, and if through its negligence injury results to an individual it becomes liable to him for the damage resulting therefrom, and the action to recover is for a tort and not for breach of contract."

We respectfully submit that the question, whether an action for tort would lie upon the facts shown, was before the Supreme Court for decision in *Trust Co. vs. Fisher*, and was necessarily decided in the affirmative by them in granting priority to Fisher's lien. For a conclusion on their part that the facts found by the jury did not in fact constitute a tort, as that word is understood in the language of the law, would have necessitated a reversal of the lower Court, and a denial of the priority of Fisher's lien over those of the bondholders.

In the first place, it is to be borne in mind that the rights of bondholders were being determined in the Federal courts. These bondholders were neither parties nor privies to the proceedings in the state courts, and therefore were not bound by the conclusion reached by that court, that the facts found

by the jury constituted a tort. That question, so far as they were concerned, was left open for determination by the federal court whose jurisdiction they had invoked.

Brooks vs. Ry. Co., 101 U. S., 443.

Hassall vs. Willcox, 130 U. S., 493.

In *Brooks vs. Ry. Co.*, 101 U. S., 443, a sub-contractor, having filed his lien upon railroad property sued thereon, making the railway company and the principal contractor, parties, and, having obtained a judgment, intervened in a foreclosure suit brought by the mortgagees. The mortgagees objected to the validity of the lien and to its being given priority, and it was urged that they were bound by the judgment of the State court. This Court says, on page 445:

"To these proceedings (suits in the State court to enforce lien) Barnes, the principal contractor, and the railroad company were parties, and we take it for granted that as against them the judgments established the validity of the liens. The judgments do not bind the appellants (mortgagees) as they were not parties thereto. The validity of the liens as against them, and, if valid, their precedence to that of the mortgage, are the questions for consideration here, and they must be determined by applying the statutes of Iowa to the facts of this case."

In *Hassall vs. Willcox*, 130 U. S., 493, a Texas statute giving priority to the labor liens on railroads, was to be construed and enforced. A creditor holding such liens obtained judgment in the State court, and afterwards intervened in a proceeding to foreclose, instituted in the federal courts by bondholders. The question of the validity and priority of the labor liens was referred to a master. The master held against the liens in part as containing charges for which no priority was given by statute. Upon exceptions the Circuit Court re-

versed this finding and gave judgment for the entire liens. The Supreme Court, in reversing the Circuit Court and sustaining the findings of the Master, held:

"(1) That the bondholders were not bound by the judgment rendered in a suit to which they were not made parties.

(2) As the claims of the creditor originated after the mortgage was made he was bound to prove affirmatively before the master the existence and priority of his liens.

* * * (6) It was proper that the claim should be re examined before a master."

Under these authorities, it is clear that, as to the bondholders, the decision in the Supreme Court of the State in *Fisher vs. Greensboro Water Supply Co.* (128 N. C., 375) formed no estoppel, and that the question whether the facts relied upon by Fisher as a cause of action were such as satisfied the definition of the legal term "*tort*" as used in the statute so as to entitle him to a preference was open for decision by the federal courts.

The conclusion reached, both by the United States Circuit Court and by the Supreme Court, that the facts found by the jury in *Fisher vs. Greensboro Water Supply Co.* (*supra*) were sufficient to sustain a judgment *for a tort*, was not therefore mere *obiter dictum*, but the decision of a question which had to be decided by the federal courts in favor of Fisher in order to give him a preference over the mortgage liens.

It remains to consider whether the federal courts were bound, by any rule of decision, to adopt the conclusion reached by the Supreme Court of North Carolina, that a judgment based on the facts shown in *Fisher vs. Greensboro Water Supply Co.* was a judgment "for a tortious injury and damage done * * * by the negligence of the defendant."

The full text of Sec. 1255 of the North Carolina Code (1883) is as follows:

“Mortgages of incorporated companies upon their property or earnings, whether in bond or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such corporations or execution for the satisfaction of any judgment obtained in the courts of this State for labor performed (nor for materials furnished such corporation) *nor for torts* committed by such incorporation, its agents or employees, whereby any person is killed or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding.”

It is to be noted that the statute contains no enumeration of the specific wrongs, judgment for which shall be entitled to priority. The Legislature makes use of the technical term “*torts*” in describing the causes of action which, when reduced to judgment, shall be given preference.

It cannot be urged, in considering the effect of the judgment of this Court in *Guardian Trust Co. vs. Fisher*, that the courts of North Carolina have by numerous adjudications settled the construction of this statute so as to raise something in the nature of “rule of property,” which the federal courts would feel inclined to follow. The previous cases in North Carolina allowing recoveries against private water companies under similar circumstances (*Gorrell vs. Greensboro Water Supply Co.*, 124 N. C., 328; *Jones vs. Durham Water Co.*, 135 N. C.) had proceeded upon the theory of the right of the party aggrieved to recover in a suit *upon the contract* with the municipality, on the theory that the contract had been entered into for the benefit of the inhabitants, and that therefore they were entitled to maintain an action thereon.

Furthermore, in *Fisher vs. Greensboro Water Supply Co.*, the Supreme Court of North Carolina does not undertake to construe or apply Section

1255. As to Fisher's rights under that law, they refused to commit themselves, the bondholders not being before them, and the question not being raised by the record. They content themselves with declaring that the facts shown, constituted a tortious injury, as that term is to be understood at common law.

But even had they undertaken to construe the statute, it is submitted that the federal courts would not be bound by such construction in a case involving parties whose rights have not been cut off by estoppel of record.

Section 34 of the Judiciary Act of 1889 has been repeatedly held by this Court to be limited in its scope to state laws strictly local, dealing with rights and titles to things having a permanent locality, such as real estate titles and other matters immovable and intra-territorial in their nature and character. The federal courts, in construing State statutes, have uniformly declared their independence of State decisions, where the questions involved were matters of a general nature, or, the terms to be defined those of general use in jurisprudence.

Swift vs. Tyson, 16 Peters, 1.

B. & O. RR. vs. Baugh, 149 U. S., 368.

Venice vs. Murdock, 92 U. S., 501.

Pleasant Township vs. Aetna, 138 U. S., 67.

As was said in *Burgess vs. Seligman* (109 U. S., 20, 34):

"The very object of giving to the national courts jurisdiction to administer the *laws of the States* in controversies between citizens of different States, was to institute independent tribunals which might be supposed would be unaffected by local prejudices and sectional views."

Granting that the bondholders whose rights were involved in *Guardian Trust Co. vs. Fisher*, must

be held to have purchased their bonds with knowledge of Section 1255 (N. C. Code), and of the priority over their claims given thereby to judgments for torts, they were, under the authorities above cited, entitled to have a federal court, whose jurisdiction is properly invoked, define the term as used in the statute, and were not concluded by the definition of the word "tort," which might be adopted by a State court in an action in which they were neither parties nor privies.

If, for example, the State court, in the action brought by Fisher against the water company, had entered a judgment *for a tort* upon facts showing clearly inevitable accident or an act of God or some other proximate cause, injuries resulting from which have been universally classed as *damnum absque injuria*, it would be absurd to say that this Court, in determining for the first time the rights of non-resident bondholders who have appealed to the federal jurisdiction, was to be held bound by such adjudication.

The Circuit Court, in its consideration of *Guardian Trust Co. vs. Fisher* (115 Fed., 189), clearly recognized its right, so far as the bondholders were concerned, to determine for itself whether a cause of action in tort formed the basis of Fisher's claim and adopted the language of this Court from *Wisconsin vs. Pelican Ins. Co.*, 127 U. S., 265, as its own:

"This judgment (*Fisher vs. Supply Co.*, 128 N. C., 375), is entitled to full faith and credit. As between the corporation and the plaintiff it would be conclusive. It is presented in a case in which mortgagees are parties; and the question is, not whether the judgment be valid, but whether it is a judgment of such character as it will be given priority to the claim of the mortgagees who were not parties to the suit in which it was obtained. When such a judgment is presented to the Court for affirmative action, while it cannot go behind the judgment for the purpose of examining into the validity of the claim, it is not precluded from ascertaining whether the claim is

really one of such a nature that the Court is authorized to enforce it."

In recognition of the same rule of decision, this Court, in considering the case, and being called upon to decide whether the judgment in the State court was for a tort, and therefore entitled to priority, apparently reached the very natural conclusion that the proper way to determine the question was to see whether the facts on which the judgment was based constituted a tort. If they did not, there was no judgment *for a tort* which this Court would enforce against the bondholders, even though the North Carolina courts had decided as between other parties that those facts did constitute a tort. If they did, Fisher was entitled to his priority under the statute. The Court answered the question affirmatively, thereby committing the Federal courts to the doctrine that a private water company, when it enters upon the performance of its contract with a municipality, incurs certain duties to the public, the breach of which, when attended by injury to private property, constitutes a tort, and that such injury is not *damnum absque injuria*.

In *Mugge vs Tampa Water Works Co.*, 42 So. Rep., 81, the Supreme Court of Florida, in considering the effect of the decision of this Court in *Trust Co. vs. Fisher*, say (p. 85):

"It is contended by the defendant in error that the only question before the United States court in these cases, was whether the judgments rendered in the North Carolina courts were in tort or on contract, and that the question of the right of the plaintiff to sue at all was not passed upon. But it seems to us that both these courts passed on the question of the right of the plaintiff to sue in tort, and that they upheld that right, for if the plaintiff did not have the right to sue in tort, then it follows that their judgments could not have been given priority over the mortgages. * * * Certainly there is noth-

ing in the opinion of these courts that suggests a doubt of the correctness of the reasoning of the Supreme Court of North Carolina, but on the contrary that reasoning is supported and strengthened."

In *Ancrum vs. Camden Water, Light & Ice Co.*, 64 S. E. Rep., 151, the Supreme Court of South Carolina reached the conclusion that an action in tort would not lie under circumstances similar to the case at bar. In their opinion, however, they say:

"A number of courts of last resort, including the Supreme Court of the United States, hold, contrary to our conclusion, that in a case of this kind the water company is liable" (citing *Trust Co. vs. Fisher*, 200 U. S., 57).

In *Kuuth vs. Butler Elect. Ry.*, 148 Fed., 73, the United States Circuit Court, sitting in the District of Montana, cited *Trust Co. vs. Fisher* as authority for the proposition that a duty may arise out of a contract, but independently of such contract, and that for a breach of it an action will lie in tort and no contract is required to support it.

Judge McDowell, in the case at bar, directly opposes the views held by these courts as to the effect to be given to the decision in *Trust Co. vs. Fisher*. His language, found on page 27 of the Transcript, is as follows:

"The first inquiry of course is whether or not the Supreme Court in the case above mentioned has rendered a binding decision on the right of the property owner to recover from a water company under the circumstances alleged in the case at bar. We are of opinion that the court did not in that case decide this question."

In his consideration of the Fisher case, the learned Judge proceeds on the theory that the Federal courts, in dealing with the rights of the bondholders, were bound by the decision of the State court, which held

that Fisher had a cause of action against the water company, the only question remaining open for determination by the United States tribunals being whether the judgment was *in tort*

It would seem that if the bondholders are to be concluded by the decision of the State court, that a cause of action existed, they should also be concluded by the judgment of that Court that this cause of action was based upon "*the tortious injury and damage done him by the negligence of the defendant*" and that the judgment should so recite. Both these questions were before the Court and both were decided by it, and if the estoppel of record included one point it would naturally extend to both. It is only upon the theory that the decision in *Fisher vs. Greensboro Water Supply Co.* did not preclude the bondholders from questioning both the existence of a cause of action and the nature of that cause, that there was anything at all for the Federal courts to decide.

If our contention as to the scope of the decision of this Court in *Guardian Trust Co. vs. Fisher* be correct, the judgment of the Circuit Court of Appeals affirming the judgment of the Circuit Court, dismissing the complaint filed in that court by this petitioner, should not be permitted to stand.

If we are mistaken, then, in view of the fact that two courts of last resort and a lower Federal tribunal have apparently fallen into the same error, some further expression from this Court, either modifying or explaining its judgment in *Guardian Trust Co. vs. Fisher* would, in furtherance of justice and to prevent uncertainty and confusion, seem to be required.

Respectfully submitted,

HARTWELL CABELL,
Of Counsel for Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. ~~220~~ **19**

Office Supreme Court, U.
FILED.

FEB 28 1912

GERMAN ALLIANCE INSURANCE COMPANY, JAMES H. McKENNE

Petitioner,

vs.

HOME WATER SUPPLY COMPANY,

Respondent.

BRIEF FOR PETITIONER.

HARTWELL CABELL,
Of Counsel for Petitioner.

STANYARNE WILSON,
Attorney for Petitioner.

WILSON & OSBOENE,
Of Counsel.

CHAS. P. YOUNG CO.,
LAW REPORTERS AND PRINTERS,
19 Beaver St., New York.



Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 232.

GERMAN ALLIANCE INSURANCE
COMPANY,
Petitioner,

vs.

HOME WATER SUPPLY COMPANY,
Respondent.

Brief for Petitioner.

STATEMENT.

The German Alliance Insurance Company, a corporation and citizen of New York, as subrogee to the rights of Spartan Mills, a corporation, seeks in this action to recover damages against Home Water Supply Company, a corporation and citizen of the State of South Carolina, for negligence and misfeasance in the furnishing of water for general fire purposes under a contract with the City of Spartanburg, S. C.

The action was brought in the Circuit Court for the District of South Carolina, the jurisdiction of which court was based on diverse citizenship.

The complaint (Transcript 2) alleges:

The ownership by Spartan Mills of the property destroyed, and its location in the City of Spartanburg; the issue to the owner, for valuable consid-

eration, by German Alliance Company of a policy of insurance against loss and damage by fire with respect to said property.

That during the life of the policy a fire had occurred which destroyed the greater part of the property insured, the loss being adjusted between the insurance company and Spartan Mills at the sum of \$38,810, which sum, less 1% discount for a payment in advance of maturity, was paid to Spartan Mills by German Alliance Insurance Company. The fire is alleged to have occurred in March, 1907, and the loss to have been adjusted and paid in April of the same year.

That in February, 1900, the city council of Spartanburg had entered into a contract with Home Water Supply Company, whereby the latter undertook to furnish an adequate supply of water for fire protection with respect to the property of the residents of Spartanburg for a period of thirty-three years; that among other things it was in said contract provided that the water company should establish all mains necessary for the distribution of water throughout the city, being given the privilege of crossing the streets of the city for the purpose of laying such pipes, conduits or aqueducts as might be necessary for the proper distribution of water throughout the city, so as to effect the most adequate supply for domestic use and greatest protection against fire; that when mains were put in for city fire protection they were to be not less than six inches in diameter, unless permission were granted by the city council.

That it was further provided in said contract that the water company should constantly, night and day, except in the case of unavoidable accident, keep all the hydrants supplied with water for fire protection; that it should keep them in

good order and efficiency for such service and should always maintain a height of at least seventy feet of water in the standpipe or water-tower, except in the case of unavoidable accident, or when water should be drawn off for the cleaning of the same, or for any cause which could not be controlled by said water company.

That the contract further provided that the city might at any time require the water company to make extensions of its system of mains by giving sixty days' notice to said company, and might order hydrants placed on such extensions at the rate of not less than ten to the mile; and that the water company should install a patent electric apparatus for opening or shutting the valve or gate between the standpipe or water-tower and its system of mains, so that, in case of necessity, and should more pressure be required than that afforded by the water-tower, the engineer could pump directly into the mains, thereby giving any pressure required.

That in the years 1905 and 1906 the said Council of Spartanburg had, in accordance with the provisions of said contract, directed and ordered the water company to put in certain hydrants with connecting pipe, which order, if obeyed, would have carried fire protection to within about two hundred feet of the first of the buildings belonging to Spartan Mills that caught fire in March, 1907; that this order had been disregarded, and on the day of the fire the nearest hydrant to the building which first caught fire was about six hundred feet.

The complaint further alleged that the water company had disregarded its contract, in that it had failed to install the patent electrical apparatus for shutting off the water-tower and obtaining increased pressure by pumping directly into the

main; that it had further disregarded its contract by using four inch pipe instead of six inch pipe in the mains which supplied the fire hydrants contiguous to the property destroyed, and that furthermore, on the day of said fire, the pressure of water in the tower was far less than the contract called for. The complaint alleges, in conclusion, that as a direct consequence of the negligence in the performance of its contract in these several regards by the water company the fire department of the City of Spartanburg and the owner of the property were powerless to check the progress of the fire which had commenced through no fault of the owner; and that one house after another was destroyed in the conflagration which ensued from lack of water with which to extinguish the flames.

The resultant damage from the neglect and malfeasance of the water company is placed at the amount of loss by fire to the Spartan Mills, which the German Alliance Insurance Company was compelled to pay under its policy, and judgment was asked in that amount against the water company.

The defendant below demurred to the complaint upon the following grounds (Transcript 8):

(a) That the complaint does not state facts sufficient to constitute a cause of action,

(b) That the complaint fails to state a cause of action in favor of the plaintiff against the defendant,

(c) That no privity of contract is shown between plaintiff and defendant,

(d) Because the alleged failure of defendant to lay water mains would not give the plaintiff of Spartan Mills a right of action against the defendant.

(c) Because the tax-payer or its assignee would have no right of action against the defendant for failure to obey the said ordinance or for violation of or for failure to perform the contract made by the defendant with the City of Spartanburg.

The Circuit Court sustained this demurrer and ordered the complaint dismissed (Transcript 9). No opinion was handed down.

The case was then taken upon error to the United States Circuit Court of Appeals for the Fourth Circuit. The assignments of error (Transcript 10) set forth at some length the several grounds upon which the German Alliance Insurance Company claimed that the action of the Circuit Court in sustaining the demurrer and dismissing its complaint, was erroneous; but they may be summarized in the single proposition that the complaint as a matter of law stated a cause of action and therefore should not have been dismissed.

The Circuit Court of Appeals sustained the judgment of the court below in dismissing the complaint, holding in substance that no action would lie, either on contract or in tort, for damages sustained by inhabitants of a municipality against a private water company supplying water under a contract with a municipality (Opinion, Transcript 19, *et seq.*).

The case came into this court upon a petition for a writ of certiorari, and the writ was granted April 11th, 1910 (217 U. S., 602).

Specification of Error.

The complaint states a cause of action, and the sustaining of the demurrer and affirmance of judgment of dismissal was error.

Argument

The only question presented by the demurrer to the complaint is whether an action in tort will lie against a private water company whose negligence and wilful disregard of its duties in supplying water has been the proximate cause of loss of plaintiff's property.

The principal ground for the writ of certiorari urged by plaintiff in its petition, was that this court by its decision in *Guardian Trust Co. vs. Fisher* (200 U. S., 57) had sustained a right of action in tort against a water company through whose negligent performance of its duties private property had been destroyed; that that decision was binding upon the lower federal courts and that the affirmance of the judgment of the Circuit Court dismissing the complaint, was in effect a refusal on the part of the Court below to follow the law as laid down by this Court.

In *Guardian Trust Co. vs. Fisher*, the facts were these. A private water company under contract with the municipality to supply water for fire purposes, having constructed its plant, executed a mortgage upon its property to secure an issue of bonds. A subsequent mortgage was made which was afterwards foreclosed and the property sold to a new corporation, subject, however, to the lien of the first mortgage. Thereupon, the new corporation executed a further mortgage covering the same property, and thereafter, and while the plant was being operated by the second company, a fire occurred which destroyed certain property located within the municipal limits.

Fisher, the owner of this property, sued the second water company in the courts of North Carolina for damages, alleging negligence on the part of the company in its failure to supply water

to extinguish the fire. By special verdict the jury found the several issues of negligence, &c., in favor of the plaintiff.

Pending this action, the trustees under both mortgages brought foreclosure proceedings in the United States Circuit Court; the property of the water company was sold under a decree of that court and the proceeds paid into court for distribution.

Section 1255 of the North Carolina Code (1883) gives the judgment creditor whose judgment is based upon *tort*, a priority over bondholders secured by a mortgage upon the corporate property; and in order to avail himself of this statutory preference, Fisher insisted that the judgment entry in the state court should show on its face that the judgment was for a *tort*. The trial court refused to make an entry in this form, and the case was taken to the Supreme Court of the state, where the lower court was reversed, the cause remanded and, under instructions, the judgment was framed to recite that the recovery was "*for a tortious injury and damage done by the negligence of the defendant*" (*Fisher vs. Greensboro Water Supply Co.*, 128 N. C., 375).

To the action in the state court instituted by Fisher, neither the trustees under the mortgages covering the property of the defendant company, nor the bondholders, were parties, and the Supreme Court of North Carolina expressly refused to pass upon the question of plaintiff's right to a preference under Section 1255 of the North Carolina Code on the ground that the question was not before them.

Fisher then intervened in the proceedings in the Federal Court, set up his judgment and claimed a preference under the section of the North Carolina Code referred to. The Circuit Court allowed

his judgment lien priority over the claims of bondholder under both mortgages, and its decree was sustained by this court, to which the case was finally brought on certiorari (*Guardian Trust Co. vs. Fisher*, 200 U. S., 57).

The decision in *Guardian Trust Company vs. Fisher* was urged upon the court below, in the case at bar, by counsel for the petitioner. In holding that it was not bound by that decision, the court proceeded upon the theory that the only question before this court in *Guardian Trust Co. vs. Fisher*, was whether the judgment of the North Carolina Court was *in tort*; that this court did not have before it the question whether, upon the facts found by the jury, a tort was shown to have been committed. The court, therefore, apparently took the liberty to disregard the very comprehensive language of the opinion of Mr. Justice Brewer in which, after reciting the conclusion of the State Court, the learned Justice said, at page 67:

“From the conclusion thus reached we are not inclined to dissent, and for these reasons. One may acquire by contract an opportunity for acts and conduct in which parties other than those with whom he contracts are interested, and for negligence in which he is liable in damages to such other parties. . . . Pollock, in his treatise, groups torts into three classes, in the last of which he specifies ‘breach of absolute duties specially attached to the occupation of fixed property, to the ownership and custody of dangerous things, and to the exercise of certain public callings’ (Webb’s Pollock on Torts, 7). This, it is said, implies the existence of some absolute duty not arising from personal contract with the other party to the action.

“And here we are met with the contention that, independently of contract, there is no

duty on the part of the water company to furnish an adequate supply of water; that the city owes no such duty to the citizen, and that contracting with a company to supply water imposes upon the company no higher duty than the city itself owed, and confers upon the citizen no greater right against the company than it had against the city; that the matter is solely one of contract between the city and the company, for any breach of which the only right of action is one *ex contractu* on the part of the city. It is true that a company contracting with a city to construct water works and supply water may fail to commence performance. Its contractual obligations are then with the city only, which may recover damages, but merely for breach of contract. There would be no tort, no negligence, in the total failure on the part of the company. It may also be true that no citizen is a party to such a contract, and has no contractual or other right to recover for the failure of the company to act, but if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the citizens, and if they avail themselves of its conveniences, and omit making other and personal arrangements for supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for a tort. The fact that a wrongful act is a breach of a contract between

the wrongdoer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby' (*Osborne v. Morgan* [130 Massachusetts, 102, 104]; see also *Emmons v. Alford* [177 Massachusetts, 466, 470]). An individual may be under no obligation to do a particular thing, and his failure to act creates no liability, but if he voluntarily attempts to act and do the particular thing, he comes under an implied obligation in respect to the manner in which he does it. A surgeon, for instance, may be under no obligation in the absence of contract to assume the treatment of an injured person, but if he does undertake such treatment, he assumes likewise the duty of reasonable care in such treatment. The owner of a lot is not bound to build a house or store thereon, but if he does so, he comes under an implied obligation to use reasonable care in the work to prevent injury therefrom to others (*Holmes on the Common Law*, 278). Even if the water company was under no contract obligations to construct water works in the city or to supply the citizens with water, yet, having undertaken to do so, it comes under an implied obligation to use reasonable care, and if, through its negligence, injury results to an individual, it becomes liable to him for the damages resulting therefrom, and the action to recover is for a tort and not for breach of contract."

In the brief upon the petition for certiorari, we contended that the question, whether an action for tort would lie upon the facts shown, *was* before this court for decision in *Guardian Trust Co. vs. Fisher* and was necessarily decided in the affirmative in sustaining the priority of Fisher's lien; that the conclusion on the part of this court that the facts found by the jury in that case did not

in fact constitute a *tort*, as that word is understood in law, would have necessitated a reversal of the judgment of the lower court and a denial of priority to Fisher's lien over that of the bondholders.

These bondholders were neither parties nor privies in the state court, and were not bound by the conclusion reached by that court that the facts found by the jury constituted a tort. That question, so far as they were concerned, was left open for determination by the Federal Court, whose jurisdiction they had invoked.

In support of this position we cited *Brooks v. Ry. Co.*, 101 U. S., 443; *Hassell vs. Wilcox*, 130 U. S., 493.

In *Brooks vs. Ry. Co.*, 101 U. S., 443, a subcontractor, having filed his lien upon certain railroad property, sued thereon, making the railway company and the principal contractor parties, and, having obtained judgment, intervened in a foreclosure suit brought by the mortgagees. The mortgagees objected to the validity of the lien and to its being given priority, and it was urged that they were bound by the judgment of the State Court. This Court said (p. 445):

"To those proceedings (the suits in the State court to enforce lien) Barnes, the principal contractor, and the railroad company were parties, and we take it for granted that as against them the judgments established the validity of the liens. The judgments do not bind the appellants (mortgagees), as they were not parties thereto. The validity of the liens as against them and, if valid, their precedence to that of the mortgage, are the questions for consideration here, and they must be determined by applying the statutes of Iowa to the facts of this case."

In *Hassall vs. Wilcox*, 130 U. S., 493, a Texas statute giving priority to the labor liens on rail-

roads, was to be construed and enforced. A creditor holding such liens obtained judgment in the State court, and afterwards intervened in a proceeding to foreclose, instituted in the federal courts by bondholders. The question of the validity and priority of the labor liens was referred to a master. The master held against the liens in part as containing charges for which no priority was given by statute. Upon exceptions the Circuit Court reversed this finding and gave judgment for the entire lien. The Supreme Court, in reversing the Circuit Court, and sustaining the findings of the master, held:

“(1) That the bondholders were not bound by the judgment rendered in a suit to which they were not made parties.

(2) As the claims of the creditor originated after the mortgage was made, he was bound to prove affirmatively, before the master the existence and priority of his lien.

* * * (6) It was proper that the claim should be re-examined before a master.”

Under the authority of these decisions, it was urged that as to the bondholders the decision in the Supreme Court of North Carolina in *Fisher vs. Greensboro Water Supply Co.* (128 N. C., 375) created no estoppel, and that therefore the question whether the facts relied upon by Fisher as a cause of action were such as satisfied the definition of the legal term “*torl*” as it is used in the statute so as to entitle him to a preference, was open for decision by the Federal courts.

If this contention be correct, it would follow that the conclusion reached both by the United States Circuit Court and by this Court, that the facts found by the jury in *Fisher vs. Greensboro*

Water Supply Co., were sufficient to sustain a judgment *for a tort*, was germane to the issues; and that the language quoted above was not mere *obiter dictum*, but involved the decision of a question which had to be decided by the federal courts in the affirmative in order to allow the judgment lien of Fisher a preference over the mortgage liens.

One other question presented upon the brief in support of the petition for the writ herein, was whether the federal courts were bound by any rule of decision to adopt the conclusion reached by the Supreme Court of North Carolina that a judgment based on the facts shown in *Fisher vs. Greensboro Water Supply Co.* was judgment "for a tortious injury and damage done * * * by the negligence of the defendant."

Section 1255 of the North Carolina Code (1883) reads as follows:

"Mortgages of incorporated companies upon their property or earnings, whether in bond or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such corporations or execution for the satisfaction of any judgment obtained in the courts of this State for labor performed (nor for materials furnished such corporation) *nor for torts* committed by such incorporation, its agents or employees, whereby any person is killed or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

This statute contains no enumeration of specific wrongs, judgment for which shall be entitled to priority. The Legislature makes use of the technical term "*torts*" in describing the causes of action which, when reduced to judgment, shall be given preference.

The previous cases in North Carolina allowing recoveries against private water companies under similar circumstances (*Gorrell vs. Greensboro Water Supply Co.*, 124 N. C., 328; *Jones vs. Durham Water Co.*, 135 N. C., 553) proceeded upon the theory of the right of the party aggrieved to recover in an action *upon the contract with the municipality*, holding that the contract had been entered into for the benefit of the inhabitants, and that therefore they were entitled to maintain an action thereon. There was therefore no "rule of property" in North Carolina arising out of numerous adjudications upon the construction of Section 1255, which federal courts would feel inclined to follow.

Moreover, in *Fisher vs. Greensboro Water Supply Co.*, the Supreme Court of North Carolina did not undertake to construe or apply Section 1255. As to Fisher's rights under that law, they refused to commit themselves, the bondholders not being before them, and that question not being raised by the record. They contented themselves by declaring that the facts found constituted a tortious injury, as that term is to be understood at common law.

But, as pointed out in the brief on the petition, even had they undertaken to construe the statute, this court would not have been bound by such construction in a case involving the rights of parties against whom there was no estoppel of record.

Section 34 of the Judiciary Act of 1889 has been repeatedly held by this court to be limited in its scope to State laws strictly local, dealing with rights and titles to things having a permanent locality, such as real estate titles and other matters immovable and intra-territorial in their nature and character. The federal courts, in con-

struing State statutes, have uniformly declared their independence of State decisions, where the questions involved were matters of a general nature; or the terms to be defined those of general use in jurisprudence.

Swift vs. Tyson, 16 Peters, 1;
B. & O. R. R. vs. Baugh, 149 U. S., 368;
Venue vs. Mardock, 92 U. S., 494, 501;
Pleasant Township vs. Actua Life Ins. Co., 138 U. S., 67.

As was said in *Burgess vs. Seligman* (107 U. S., 20, 34):

"The very object of giving to the national courts jurisdiction to administer the *laws of the States* in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views."

Granting that the bondholders, whose rights were involved in *Guardian Trust Co. vs. Fisher*, must be held to have purchased their bonds with knowledge of Section 1255 (N. C. Code), and of the priority over their claims given thereby to judgments were for torts, they were, under the authorities above cited, entitled to have a federal court, whose jurisdiction is properly invoked, define the term as used in the statute, and were not concluded by the definition of the word "tort," which might be adopted by a State court in an action in which they were neither parties nor privies.

Suppose, for example, the State court, in the action brought by Fisher against the water company, had entered a judgment *for a tort* upon facts showing clearly inevitable accident or an act

of God or some other proximate cause, injuries resulting from which have been uniformly held to be *damnum absque injuria*. This Court, in determining for the first time the rights of non-resident bondholders who have appealed to the federal jurisdiction, would surely not be bound by such a judgment.

The Circuit Court, in its consideration of *Guardian Trust Co. vs. Fisher* (115 Fed., 184, 189), clearly recognized its right, so far as the bondholders were concerned, to determine for itself whether a cause of action in tort formed the basis of Fisher's claim, and adopted the language of this Court from *Wisconsin vs. Pelican Ins. Co.*, 127 U. S., 265, as its own:

"This judgment (*Fisher vs. Supply Co.*, 128 N. C., 375) is entitled to full faith and credit. As between the corporation and the plaintiff, it would be conclusive. It is presented in a cause in which mortgagees are parties; and the question is not whether the judgment be valid, but whether it is a judgment of such a character as it will be given priority to the claim of the mortgagees, who were not parties to the suit in which it was obtained. When such a judgment is presented to the court for affirmative action, while it cannot go behind the judgment for the purpose of examining into the validity of the claim, it is not precluded from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."

In recognition of the same rule of decision, this Court, in considering the case, and being called upon to decide whether the judgment in the State court was for a tort, and therefore entitled to priority, apparently reached the very natural conclusion that the proper way to determine the ques-

tion was to see whether the facts on which the judgment was based constituted a tort. If they did not, there was no judgment *for a tort* which this Court would enforce against the bondholders, even though the North Carolina courts had decided as between other parties that those facts did constitute a tort. If they did, Fisher was entitled to his priority under the statute. The Court answered the question affirmatively, thereby, it would seem, committing the federal courts to the doctrine that a private water company, when it enters upon the performance of its contract with a municipality, incurs certain duties to the public, the breach of which, when attended by injury to private property, constitutes a tort, and that such injury is not *damnum absque injuria*.

Guardian Trust Co. vs. Fisher has been cited or its effect commented upon in three cases.

In *Mugge vs. Tampa Water Works Co.*, 42 So. Rep., 81, the Supreme Court of Florida, in considering the effect of that decision say (p. 85):

"It is contended by the defendant in error that the only question before the United States courts in these cases was whether the judgments rendered in the North Carolina courts were in tort or on contract, and that the question of the right of the plaintiff to sue at all was not passed upon. But it seems to us that both of these courts passed on the question of the right of the plaintiff to sue in tort, and that they upheld that right, for, if the plaintiff did not have the right to sue in tort, then it follows that their judgments could not have been given priority over the mortgages. * * * Certainly there is nothing in the opinions of these courts that suggests a doubt of the correctness of the reasoning of the Supreme Court of North Carolina, but, on the

The same doctrine has received general recognition in the courts of this country. The liability of railroad companies, electric light and gas companies, and other and similar quasi-public corporations, for their negligence, irrespective of contract, is too well settled to require citation of authorities. Many other callings of a public nature have been held to be within the same rule of responsibility.

In *Robinson vs. Chamberlain*, 34 N. Y., 389, an individual for valuable consideration had covenanted to keep certain lock gates on the Erie Canal in repair. Through the negligence of the contractor in making repairs, one of the gates gave way while the plaintiff's boat was passing through, thereby causing damage. In an action in tort against the contractor by the injured individual, the court permitted a recovery, stating the rule to be that:

"A public officer, or a contractor engaged to perform the duties of a public officer, is liable for negligence or malfeasance to any one sustaining special damage in consequence thereof."

In the concurring opinion of Smith, *J.*, he says (page 402):

"By his contract with the State he (defendant) assumed a duty to the public. If he is not to be regarded as a public officer in all respects, it is at least true that certain public functions formerly discharged by public officers were *farmed out* to him by authority of law, and for a breach of duty in respect to the exercise of such functions, he is liable to any person injured thereby."

In *Fulton Fire Insurance Co. vs. Baldwin*, 37

N. Y., 648, the defendant had contracted to keep a section of the Erie Canal in repair and free from obstructions to navigation. A canal boat was sunk by a snag carelessly left in the channel and the cargo damaged. Plaintiff paid the loss under its policy and by right of subrogation brought suit against the contractor. The court in its opinion by Mason, *J.*, on page 650, says:

"The defendant, under his contract with the State to keep this section of the Erie Canal in repair and free from obstructions, owed a duty to perform it; and which inured to the benefit of every citizen in the State who might have occasion to use this canal, and the defendant's neglect to remove this obstruction in disregard of the duty which he owed to all who might be concerned in the navigation of the canal, rendered him liable in this action."

In *Little vs. Banks*, 85 N. Y., 258, under a contract between Banks and the State of New York, the former agreed to publish and sell the State Reports upon certain terms. The contract provided, among other things, that Banks should keep on sale, furnish and deliver volumes of the reports, and that he should supply other booksellers at a fixed price and in certain quantities. The plaintiff, a bookseller, applied for a supply of the reports in accordance with the terms of this contract, and was refused. He thereupon brought his action for damages. The Court say, through Miller, *J.*, page 263:

"Contractors with the State, who assume, for a consideration received from the sovereign power, by covenant, express or implied, to do certain things, are liable, in case of neglect to perform such covenant, to a pri-

in the city and the resulting loss to the city in the amount of taxes collected. The right to recover was denied upon the ground that the city's interest in the property destroyed was too remote and its damages merely consequential.

In *Bonaparte vs. Camden & Amboy R. R. Co.*, Baldwin C. C. [U. S.], 205, the test to be applied in determining whether an individual or a corporation has been guilty of a breach of public duty, is thus expressed, page 223:

"The true criterion is whether the objects, uses and purposes of the incorporation are for public convenience or private emolument, and whether the public can participate in them by right, or only by permission."

This test was applied by the Supreme Court of Massachusetts in the case of *Kiernan v. Metropolitan Construction Co.* (170 Mass., 378). Plaintiff's house was on fire, and upon the sidewalk in front of it, was a fire hydrant connected with the fire service. The fire department of Chelsea came to put out the fire, and attempted to use the hydrant. It was covered in part or whole by a barrel filled with hay, placed over it by defendant. The Court say, page 379:

"The hydrants were especially provided as a means of putting out fires, and the plaintiff had a right to have that hydrant used by the fire department to extinguish the fire in their house, if it chose to do so. While it is true, * * * that there was no obligation upon the city to extinguish the fire, it does not follow that the plaintiff was not deprived of anything to which she had a legal right if the defendant obstructed the firemen from getting water from the hydrant. She had a legal right to have the firemen get the water, if

they chose to do so, from a supply provided especially for that purpose."

The position taken by some authorities that the duty cannot be considered independently of the contract because the contract by its terms defines the measure of duty, and that therefore the duty is not *public* in its nature, but one owing only to the other party to the contract—the city—cannot be sustained on principle. Although no court has squarely said so, we submit that the duty to furnish water for fire purposes having once been undertaken, the only question that can arise in an action for negligent performance of such duty is, whether the supply was reasonably adequate for the purpose for which it was intended. If a city, by its contract, has required of the water company a pressure so excessive as to be out of all reason, and the water company in a suit brought against it for negligence could show that while it had not literally complied with its contract it had maintained a reasonably adequate supply and pressure, we think there could be no recovery. On the other hand, we believe that liability cannot be evaded by a public servant by showing that his contract with the city called for no specified pressure or supply, or for a pressure or supply ridiculously inadequate. In other words, we submit the true rule to be that the contract in these cases is to be used just as speed ordinances are used in the "crossing" cases. They are evidence of what is *reasonable* and may be considered by juries in that light. Having entered upon a public calling, the water company owes a duty entirely independent of its contract and in no way bounded or measured by its terms.

In *Borough of Washington vs. Washington Water Co.*, 4 Robbins (N. J.), 254, a contract be-

tween a water company and a borough had expired. The water company and the borough authorities had entered into a heated controversy as to the prices to be paid for water to be furnished in future, and the water company threatened to turn the water off until some adjustment could be reached. The Court held that the water company, being a quasi-public company discharging duties to the public, had no right to cease rendering services to the public, although the contract under which those services had been rendered had expired, and although it had failed to reach an agreement with the city with regard to future payments for those services.

The same conclusion was reached where a gas company was concerned. (*Public Service Corporation vs. American Lighting Co.*, 1 Robbins, 122.)

II.

Does the immunity from suit enjoyed by a municipality which undertakes to furnish water for fire purposes inure to the benefit of a private water company with which it has contracted for such supply?

Some courts have held that in furnishing a supply of water for fire purposes, the water company is acting as a governmental agency—a delegate of the municipality; and since the city cannot be held liable for failure to supply water for such purposes even when it has undertaken to do so, neither can a water company be held liable.

Britton vs. Green Bay, etc., Water W. Co., 81 Wis., 48;

Nichol vs. Huntington W. Co., 53 W. Va., 348;

Akron Water Works Co. vs. Brownless, 10 Ohio C. C., 620.

The conclusion reached in these cases is due to a confusion of ideas which should have been kept quite distinct. When governmental functions are delegated to a municipality, the immunity of the sovereign from suits by its subjects accompanies their exercise by the municipality. The individual property owner is without a remedy against the city simply because the city in providing fire protection exercises the sovereign power of the state and hence cannot be sued. As the Court of Appeals of New York said in *Springfield Ins. Co. vs. Keeseville* (148 N. Y., 46), if "the defendant (the municipality) assume a governmental function," then it "comes under the sanction of the rule which exempts governments from suits by citizens."

But it is a *non sequitur* to say that because a municipality is not liable to individuals, a private water company which undertakes to perform the same acts is also not liable. When a municipal corporation does these acts it is a discretionary agent of the State, performing a function of sovereignty, and simply cannot be sued, while the water company does not represent the State and enjoys no such exemption.

People, ex rel., Mills W. W. Co. vs. Forrest, 97 N. Y., 97.

To hold, as the cases cited above do hold, that the exemption of the municipality from suit by individuals is due the public and general character of the beneficiary, and that therefore the water company which serves the same purpose is also exempt, is to overlook the very basis of municipal non-liability. The question is not one of beneficiaries at all, but of a technical exemption from suit granted on grounds of public policy to cities

and other municipal corporations, but denied to private corporations.

III.

One objection which has been urged in permitting a recovery in these cases remains to be considered. It has been stated in several different ways.

Thus it has been urged that unless water companies are protected from the consequences of their own faults capitalists would not readily seek investment in enterprises involving such incalculable hazards, and the general public would lose the benefits now derived from them.

The same idea is expressed a little differently by the court below (Transcript, p. 27) :

"For the attainment of these municipal ends, the city has the right to pay out public funds, it may well be doubted whether it has the right to apply public funds to the larger compensation which the water company of necessity must charge for the enormous peril of having to pay for all private property lost by its negligence. Such expenditure of municipal funds raised by taxation of all property would be an unjust discrimination in favor of those whose property is exposed to fire loss, and against those whose property is not subject to that peril. There is at least a strong presumption against a municipality undertaking to pay for such indemnity from the public revenue."

These conclusions are based upon the admitted negligence of the water company. There is no question of unavoidable accident or act of God. The persons seeking redress do not seek to place the water companies in the attitude of insurers

against fire loss. The only question is, are they to be held responsible for their own negligence where that negligence has been the proximate cause of the loss.

A water company, in entering upon the discharge of its duties, presumably has the advantage of plans and calculations made by skilled engineers. It knows in advance what it will cost to furnish the water in the quantities required and at a proper pressure, and the price to be paid is presumably determined so as to allow for at least a reasonable profit. It is presumed also to have in mind the natural consequences of a failure on its part in the performance of its duty, and it requires no expert to tell it that water is needed to extinguish fires; that the citizens of the municipality as well as the municipality itself will rely upon the performance of its duty to furnish an adequate supply at a proper pressure; and that a continuous failure on its part to conform to its duty is bound at some time to cause a loss.

To permit a tortfeasor to escape the result of his own acts or omissions merely because his disregard of the duties laid upon him by law has caused a loss to others, which, by reason of its magnitude it would ruin him to pay, is surely a strange doctrine.

If a private water company, in undertaking to furnish water to the inhabitants of a municipality for protection against fire, has entered into a public calling or has assumed certain duties with respect to the inhabitants that are public in their nature, there is no reason why it should escape liability caused by its negligent acts or omissions that would not apply with equal force to railroad companies, street car companies and other quasi-public corporations through whose negli-

gence individual members of the general public suffer injuries.

It is submitted that the judgment of the court below should be reversed and the cause remanded.

Respectfully,

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Supreme Court of the United States

OCTOBER TERM, 1911.

No. ~~20~~ 19

Office Supreme Court,
FILED.

MAR 27 1912

JAMES H. McKEN

GERMAN ALLIANCE INSURANCE COMPANY,

Petitioner,

vs.

HOME WATER SUPPLY COMPANY,

Respondent.

BRIEF FOR RESPONDENT

J. A. PHIFER,

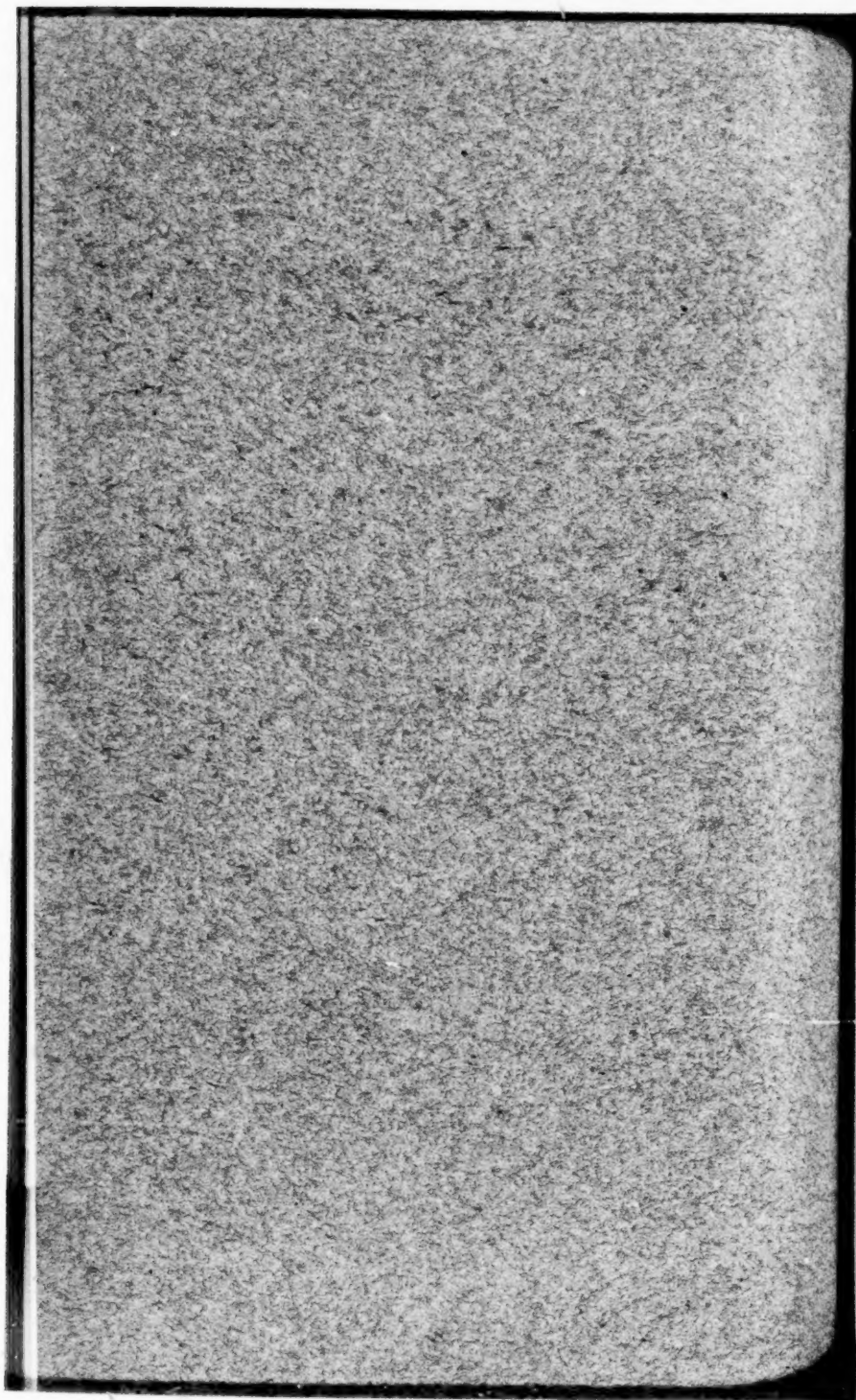
Of Counsel for Respondent.

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Of Counsel.



Supreme Court of the United States

OCTOBER TERM, 1911.

No. 232.

GERMAN ALLIANCE INSURANCE COMPANY, <i>Petitioner,</i>	}
<i>vs.</i>	
HOME WATER SUPPLY COMPANY, <i>Respondent.</i>	

Brief for Respondent.

The statement of facts in the brief of petitioner is correct in the main but incorrect in some of the details as to what the complaint really alleged and what the contract between the Water Supply Company and the City of Spartanburg really was in the following particulars:

Home Water Supply Company did not "undertake to furnish an adequate supply of water for fire protection with respect to the property of the residents of Spartanburg for a period of thirty-three years" (f. 2), but they were "authorized and empowered to maintain, etc., waterworks—to supply the city and its inhabitants with—water, suitable for fire, sanitary and domestic purposes"—"to use—streets—" which may be necessary for proper distribution throughout said city so as to effect the most adequate supply for domestic use and greatest protection against fire"—"for the

term of thirty-three years from first of January, 1900" T. or R. F. 4.

The contract did not provide "that the water company should establish all mains necessary for the distribution of water throughout the city—so as to effect the most adequate supply for domestic use and greatest protection against fire," nor were "the mains to be less than six inches in diameter unless permission were granted by the City Council." F. 2.

The contract was (T. of R. F. 7): "There shall be not less than six miles of pipe in all, ranging in size from 10 to 4 inches, for distributing water throughout said town—"

"Section 6. And the city may at any time require the said grantees to make extensions of the pipe system of the said waterworks, by giving sixty days notice to said grantees." T. of R. F. 6. It is noticeable that the complaint does not allege that any *notice* whatever was ever given, but merely that in 1905 and 1906 the City Council ordered the company to put in certain hydrants with connecting pipe, which order, if obeyed, would have carried water protection" 450 feet nearer to the fire on March 25th, 1907. T. of R. F. 12.

The complaint (allegation 10) does not pretend to allege there was no electrical appliance or that the appliance that was in use was defective in any particular, but merely "that the defendant company further failed and neglected to discharge its duty to said property and its owner * * * in not having the electrical appliance called for in Section 4 of said contract," thereby alleging a legal conclusion and an allegation pregnant, in that it is not alleged in what particular the appliance used was defective. It is also a legal conclusion as to what is "sufficient" pressure "or anything like it." As to the other specifications of negligence "in not having a pipe of sufficient size at the nearest approach to said locality; at least six inch pipe instead of inadequate four inch pipe," will state there is no provision in the contract as to what size pipe should be laid on different streets or in different localities. With the same propriety he could have alleged that defendant was negligent in laying any four

inch pipe at all, though the contract expressly provides he may do so.

Argument.

Though it is not conceded, if the complaint does allege specific acts of negligence which would ordinarily constitute a cause of action, if there was such a privity between the plaintiff and the City of Spartanburg as would entitle the plaintiff to bring this action, then practically but one question is raised by the plaintiff's exceptions to the opinion rendered by the United States Circuit Court of Appeals, to wit: Does immunity from liability attach to a private corporation under contract with a municipality to provide water for general purposes for fire losses, due to its negligent failure to furnish a proper water supply as required by its contract, when hailed into Court by a taxpayer owning property within the limits of such municipality? The specific acts of negligence which the plaintiffs claim to have alleged, and upon which they rely are:—

(a) Want of pressure.

(b) Failure to extend the water mains when ordered by the City Council, and construct plant in accordance with contract with City Council.

In discussing this question of liability on the part of the defendant for the loss of the plaintiff's property, under the circumstances alleged in the complaint, we desire to present the question involved in connection with the following propositions:

1. That the plaintiff, as a taxpayer and citizen of the City of Spartanburg, under the allegations contained in the complaint, does not sustain any contractual relation with the defendant company.

3. That the plaintiff cannot maintain this action if it be viewed as an action *ex contractu*, in the absence of a contract relation.

3. That the plaintiff, under the allegations contained in the complaint, cannot maintain this action if it be viewed as an action *ex delicto*, because the complaint shows that the alleged loss of the buildings therein described, as the

result of its failure to comply with its contract with the municipality, is not a loss by one sustaining a contract relation with the defendant.

4. That this action is based upon an alleged careless and wilful breach of duty growing out of the contract between the defendant and the City Council of Spartanburg, to which plaintiff is not a party or in privity therewith, and is not an action for tort in any other sense.

5. That if the contract between the defendant company and the municipality creates a duty on the part of the water company, then the contract must be the measure of that duty and of the liability involved.

6. That inasmuch as the City of Spartanburg would not be liable for damages under the allegations of the complaint if the said city was operating the waterworks, there are no legal obligations owing from the city to its property owners and taxpayers which would make a contract of this kind available to the individual property owner.

7. That the alleged breach of contract is not the proximate cause of the loss sustained by the plaintiff.

A careful examination of this contract between the city and the waterworks fails to disclose anything therein which would even tend to establish any direct contractual relation between the plaintiff and defendants in its stipulations and limitations. It may be said that this contract is characteristic of its class, and while as the Court remarks in the case of *Mugge vs. Tampa Waterworks*, 6 L. R. A. (N. S.) 1176, "The terms and conditions of the various contracts are not always alike, but the doctrine of the want of privity of contract between a property owner and the water company runs through them all." There is practically no feature in the contract set out in the complaint which will destroy or even impair the force of that vast array of judicial decisions against the liability of a water company under the circumstances here involved, so far as the terms of such contract are gathered from statement and reference to the same in such decisions.

When the opinion was handed down by the State Supreme Court in the case of *Mugge vs. Tampa Waterworks Co.*,

supra, the editors of the L. R. A. considered it so unusual and revolutionary that they deemed it necessary to attach an extensive case note which covers the matter so fully I feel it should be incorporated herein, to wit:

"Liability of water company in tort for loss to one sustaining no contract relation with it by its failure to comply with its contract with the municipality:

"Unless the Court has intended to adopt in the above case a principle to which, although discussed, it does not expressly commit itself, the decision is so unprecedented in the law of torts, and the consequences of its application are so far reaching, as to make it almost revolutionary. A liability in tort is always based on a breach of duty. And in order to entitle one to maintain an action, he must show that the person guilty of the tort owed him some special duty which will give him a standing in Court. To enable one whose property has been destroyed by failure of a water company to furnish water to maintain an action in tort against the company he must show a contract relation with it. It is the necessity of this contract relation to which the Court fails clearly to commit itself, and what it says on the subject is so indefinite that unless the necessity for such relationship is kept in mind, the decision is apt to be misleading. In fact, it is somewhat difficult, even after a careful study of the opinion, to determine on what theory the Court actually proceeds to establish the liability of the water company, and a superficial reading leaves the impression that the Court resorted to the tort theory to avoid the necessity of committing itself upon the contract theory, in respect to which the decisions are hopelessly in conflict. From the emphasis which the Court places upon the opinion of the Supreme Court of the United States in *Guar. Trust and D. Co. vs. Fisher*, 200 U. S. 57, 50 L. Ed. 357, the impression is strong that the Court abandoned the idea of the necessity of a particular duty owing to the individual injured, to sustain the action. If such is the intention the holding is certainly far in advance of any-

thing which has preceded it. Such an intention would not be surprising in view of the very loose and unsatisfactory reasoning of the Supreme Court of the United States in the Fisher case. That case arose under the law of North Carolina. In that State the Court has established the rule that the taxpaying property owner is the real party in interest to a contract by a municipality which acts as his agent with a water company for a supply for fire purposes. *Gorrell vs. Greensboro Water Supply Co.*, 124 N. C. 328, 46 L. R. A. 513. This being true, the property owner has in that State a right of action on the contract for its breach. Therefore he comes into such a relation with the water company that, in case of its failure to perform its duty as a public service corporation to his injury, he may, under well established principles, declare in tort or in contract, at his discretion. This is all that the Court decided in the case of *Fisher vs. Greensboro Water Supply Co.*, 128 N. C., 38 S. E. 912. And this is all that the United States Circuit Court, or the United States Supreme Court, had to decide in passing upon the correctness of the action of the North Carolina Court in entering the judgment in tort rather than in contract. *Guardian Trust and D. Co. vs. Greensboro Water Supply Co.*, 115 Fed. 184; *Guar. Trust and D. Co. vs. Fisher*, *supra*. Furthermore, it appears from the opinion of the Supreme Court in the Fisher case that *one of the ordinances under which the water company was acting provided that the water company should be responsible for all damage sustained by the city or any individual or individuals from the negligence of the company in either the construction or operation of the plant.* The liability of the company to the injured property owner is therefore established, either because of the special provision of the ordinance, or by reason of the contract relation between the property owner and the water company. But both the United States Circuit Court and the United States Supreme Court fail to mention these facts in their statements of the principles upon which the liability of the

water company depends. The opinion of the Circuit Court simply goes to the extent of holding that, because of the character of the public service it has undertaken, the water company had assumed an obligation, the breach of which would render it liable in tort, but the Court intimates no opinion on the right of the plaintiff to maintain the action. The Supreme Court of the United States, however, while correct in its conclusion that the judgment might properly be entered in tort, is exceedingly unfortunate in the reasoning by which it reaches such conclusion. It cites no authority in point upon the subject, but gives certain illustrations of the liability of persons undertaking a certain duty in case they negligently fail to perform their undertaking. It says, "Even if the water company was under no contract obligations to construct waterworks in the city, or supply the citizens with water, yet having undertaken to do so, it comes under an implied obligation to use reasonable care, and if, through its negligence, injury results to an individual, it becomes liable to him for the damage resulting therefrom, and the action to recover is for tort, and not for breach of contract." It will be observed that the Court makes no distinction between injury resulting through nonfeasance and one resulting from misfeasance, which distinction is very material in dealing with liability upon this question. As illustrations to support its conclusions, it assumes that a company is chartered to construct and operate a railroad. Nothing may be said in the charter in reference to the manner in which the road shall be operated or the particular acts which it must do. If, from undue speed, failure to give proper warnings, or other like acts or omissions, individuals are injured, they may recover for such injuries, and their actions to recover sound in tort. It requires no argument to show that this is the ordinary case of liability for one injured by misfeasance, and the question of public service is utterly immaterial. Again it says: 'If a railroad contracts to carry a passenger, there is an implied obligation he will be carried with reasonable care for his safety. A failure to

exercise such care, resulting in injury to the passenger, gives rise to an action *ex contractu* for breach of the contract, or as well to an action for the damages on account of the negligence—an action sounding in tort.' Here the relationship which gives the passenger the right to sue is founded on his contract. Again the Court says, a surgeon 'may be under no obligation, in the absence of contract to assume the treatment of an injured person, but if he does undertake such treatment he assumes, likewise, the duty of reasonable care in such treatment.' The liability here is the mere contract liability to use the skill which he assumes to possess. And the liability would be for misfeasance rather than nonfeasance. Again, the Court says the owner of a lot is not bound to build a house or store thereon, but if he does so, he comes under an implied obligation to use reasonable care in the work to prevent injury therefrom to others. This again is a case of misfeasance and not nonfeasance. These are all the illustrations upon which the Court founds its conclusion, *and they come far short of establishing the fact that one of the public having no special relation to the public service corporation may sue for injuries caused by breach of its public duty.* If, through negligence, a railroad company fails to transport a sufficient supply of coal into a particular section of the country during severe weather, is it liable to every one who suffers from the cold by reason of its negligence? Again, a train is wrecked through negligence, is the company liable for one who, at a station not yet reached, was waiting to take the train to meet an important engagement further down the road? Again, a railroad builds a branch into a region suitable for a summer resort, relying on the presence of the road a hotel is built to accommodate the public, by reason of the negligence of the road in failing to meet its schedules, the public refuse to patronize it, and the hotel is a failure, can the proprietor maintain an action against the railroad company for his loss? The general understanding has been that in none of these cases would an action lie, because the public cor-

poration owed no duty to the particular individual to whom the injury was caused. The few cases cited to support the rulings by no means tend to do so. In *Coy vs. Indianapolis Gas Co.*, 146 Ind. 655, 36 L. R. A. 535, 46 N. E. 17, a natural gas company undertook to supply a certain municipality with its gas. It entered into a contract with the householder to furnish gas to him and pipe the gas into his house, thereafter in cold weather he negligently failed to maintain the pressure, to the injury of the consumer. He brought an action and recovered in tort, the right to recover in tort being based on breach of the public duty, but his right to maintain the action arose out of the particular duty due him under the contract. Would the gas company have been liable to one in case it had merely failed to pipe gas into his house, after being requested to do so, for injuries from cold due to the absence of gas? In *Lambert vs. Laclede Gas Light Co.*, 14 Mo. App. 376, a gas company had undertaken by contract with the municipality to light the streets and maintain the lamps and posts in safe condition. By accident a post was knocked down and obstructed the sidewalk, so that a passerby stumbled over it and was injured. He brought an action setting up the contract by which the gas company had undertaken to care for the post, and the Court, while deciding that in the particular case no negligence was shown, devotes a considerable portion of its opinion to establishing the right to sue upon the contract. The contract in the case was immaterial, excepting as it showed the responsibility of the gas company for the accident. The case was the ordinary one of obstruction of a public way and injury therefrom, which would establish a right of action in favor of the person injured, and the only effect of the contract in the case was to show who was responsible for the obstruction. The plaintiff's right of action did not depend upon the public undertaking or contract of the defendant, but upon the fact that it had obstructed a public highway, which was a case of misfeasance, and not nonfeasance. Would the light company have been

liable to one injured by a defect in the highway merely because it had negligently failed to keep a light burning? Even the cases which have held a railroad company liable for failure to furnish cars have usually gone upon the ground of discrimination or, like the recent Mississippi case of *Yazoo and M. Valley Railroad vs. Blum Co.* (Miss.), 40 So. 748, because it had actually received the property for transportation and thus came into a contract relation with the shipper which it negligently failed to perform.

"In jurisdictions where a contract relation between a taxpayer and a water company is recognized there can be no question but that the judgment can be entered either in contract or tort, and it may be very advantageous to the plaintiff to proceed in tort rather than in contract, for, as pointed out in *Coy vs. Ind. Gas Co.*, *supra*, the damages in action of contract must be such only as would be the natural result of the breach for such as were within the reasonable contemplation of both parties, while in tort this limitation does not prevail, but all damages may be recovered which are directly traceable to the wrong done, and arise without an intervening agency and without fault of the injured person himself. In an action for tort, therefore, the only question that can arise upon the question of damages is one of proximate cause, while the action of contract the question what damages would be within the contemplation of the parties would be very material and it is exceeding doubtful if the contract liability of the water company could be shown to cover the value of the buildings destroyed through its mere failure to furnish water pressure.

"In the jurisdiction, however, in which the contract relation of the taxpayer to the water company is not recognized, which, as shown in the case of *Lovejoy vs. Bessemer Waterworks Co.*, 6 L. R. A. 429, are greatly in the preponderance, the action ex delicto will not lie any more than the action ex contractu, because there is no relation between the taxpayer and the water company or no special duty owing by it to him, failure to

perform which can be regarded as an injury to him, the existence of which, under the law of torts, is necessary to the maintainance of the action. This is an element which the Supreme Court of the United States failed to bring out, and this failure seems to have misled the Court in *Mugge vs. Tampa Waterworks Co.* into the adoption of reasoning in support of a decision which is not founded on principle. Before the Court could reach such a conclusion, it must first conclude that the taxpayer has a contract relation with the waterworks company which will give him a right to maintain the suit.

"The above conclusion is supported by the cases which have directly dealt with the question involved. Some of the Courts which have denied liability of the water company have adopted language general enough to apply to liability in tort as well as in contract, but since they did not expressly consider the liability in tort their reasoning cannot be regarded as directly in point. The Supreme Court of Wisconsin, however, expressly considered the question of liability in tort. The complaint in the case founded the liability first upon the breach of contract, and second upon neglect of duty; the Court, after determining that there was no liability for breach of contract, took up the question of liability for neglect of duty and held that the municipal ordinance constituting a contract did not impose upon the water company a statutory duty which would give a right of action to the individual taxpayer, and that no action could grow out of a contract, since it did not impose upon the water company a special or personal duty to a taxpayer which was necessary to sustain the action in tort. *Britton vs. Green Bay and Ft. H. Waterworks Co.*, 81 Wis. 48, 29 Am. St. Rep. 856, 51 N. W. 84.

"The Texas Court, in *House vs. Houston Waterworks Co.*, 88 Tex. 233, 28 L. R. A. 532, 31 S. W. 179, have also carefully investigated the question. It determined that the taxpayer cannot sue on the contract, and then stated that it was claimed that he could sue in

tort. The Court, in denying the claim, states that negligence which consists merely in the breach of a contract will not afford a ground of action by anyone who is not a party to the contract nor a party for whose benefit the contract was avowedly made. It states that the water company had not been guilty of a breach of duty which it owed the plaintiffs apart from the contract or growing out of any relations between them created by or arising out of contract, that under the contract the duty was owing to the city and not to the citizen, and is not, therefore, such a duty as would give a right of action by a failure of performance to the individual who may be injured thereby. The Court further says it is no answer to quote the well-established rule that a person or corporation that undertakes the performance of a public duty is liable to any person injured thereby for a negligent failure to perform their duty. It must first be established that the duty is to the individual before the rule is applicable.

"Again, in *Fowler vs. Athens City Waterworks Co.*, 83 Ga. 219, 20 Am. St. Rep. 313, 9 S. E. 673, the Georgia Court, after determining there was no liability ex contractu, asked, 'Is the action better founded treating it as one ex delicto?' It proceeds, 'We think not. The violation of a contract entered into with the public, the breach being by mere omission, or nonfeasance, is not tort direct or indirect to the private property of an individual though he be a member of the community and a taxpayer to the government. We are unable to see how a contractor with the city to furnish water to extinguish fires commits any tort by failing to comply with its undertaking unless to the contract relation there is superadded a legal command by statute or express law.'

"The reasoning of the Georgia Court is supported in *Nichols vs. Huntington Water Co.*, 53 W. Va. 348, 44 S. E. 290, to support his conclusion that, after denying the liability in contract, a different conclusion cannot be reached by applying the principles governing actions ex delicto.

"The reason of the Georgia Court is also adopted in *Fitch vs. Scymore Water Co.*, 139 Ind. 214, 47 Am. St. Rep. 258, 37 N. E. 92.

"In *Nickerson vs. Bridgeport Hy. Co.*, 46 Conn. 24, 33 Am. St. Rep. 1, the question arose upon demurrer to complaint. The complaint was in three counts. The first merely alleged the duty of the water company to furnish water supply and its failure to do so. The second relied on the contract between the water company and the municipality, the third, after setting out the contract, alleged that the water company negligently failed to comply with it, to the plaintiff's injury. The Court, after holding there was no liability under the contract, states that there being no contract relation between plaintiff and defendant, consequently there was no duty which could be the basis of a legal claim. *The absence of duty owing by the water company to the complaining taxpayer has, therefore, by all the Courts which has directly considered the question, been regarded as fatal to the maintainance of an action in tort.*"

It is inconceivable how the plaintiff can contend that the question of whether an action for tort would lie was before the Court for decision in *Guardian Trust Company vs. Fisher*, for in that case, when the matter was before the Circuit Court of Appeals, the Court expressly said:

"This brings us to the question in the case: Have those judgments a lien prior to the lien of the mortgages? Are these judgments 'for torts committed by the corporation, its agents or employees' whereby property was injured? The interveners produce the judgments in each case, which distinctly state that damages are given 'for the tortious injury and damage done by the negligence of the defendant.' The Supreme Court of North Carolina held in this case that, under the facts in the case, the plaintiff was entitled to declare in tort; that 'although action may have been maintained upon a promise implied by law, yet an action founded on tort was the more proper form of action, and the plaintiff so declared.' *Fisher vs. Supply*

Co. (N. C.), 38 S. E. 914. *This judgment is entitled to full faith and credit. As between the corporation and the plaintiff it would be conclusive. It is presented in a cause in which mortgagees are parties; and the question is not whether the judgment be valid, but whether it is a judgment of such a character as it will be given priority to the claim of the mortgagees who were not parties to the suit in which it was obtained. 'When such a judgment is presented to the Court for affirmative action, while it cannot go behind the judgment for the purpose of examining into the validity of the claim, it is not precluded from ascertaining whether the claim is really one of such a nature that the Court is authorized to enforce it.' Wisconsin vs. Pelican Ins. Co., 127 U. S. 263, 8 Sup. Ct. 1370, 32 L. Ed. 239."*

It is a noticeable fact, conspicuous by its absence, that the complaint does not allege the existence of an ordinance in effect in the City of Spartanburg under which the water company was acting which provided that the water company should be responsible for any or all damage sustained by the city or any individual from the negligence of the company in either the construction or operation of the plant; whereas, the existence of such an ordinance did appear in the opinion in the Fisher case, and while the existence of this ordinance was not stressed in the Supreme Court of the United States, such fact could well have formed the basis of the judgment when it was first rendered in the North Carolina Court.

And while it was a rule of law in North Carolina when judgment was rendered in favor of the judgment creditors that the taxpaying property owner is the real party in interest to a contract by a municipality which acts as its agent with a water company for a supply for fire purposes, *Gorrell vs. Water Supply Co., supra*, no such rule of law prevails in South Carolina. On the other hand, in the case of *Black vs. City of Columbia*, 19 S. C. 412, "The plaintiff brought action for damages against a municipal corporation, based upon the destruction of his house by fire, resulting from an inadequate supply of water, to a sufficient

supply of which he claimed to be entitled by reason of a water tax assessed upon such property by the city, and paid by him. Held on demurrer that the act was for tort, and therefore, as against a municipal corporation, could not be maintained." Syllabus. A case more in point is that of *Ancrum vs. Camden*, 82 S. C., in which the plaintiff sought to hold the defendant liable in an action ex delicto for damages by reason of the company's negligent failure to furnish water. The Court held that the municipality was not in any legal sense the agent of its inhabitants, either singly or collectively, and denied the plaintiff's right to recover, holding that the theory that the municipality was her agent did not apply. The Court further held that the municipality could have made a contract with the defendant by which the defendant would have assumed liability to the inhabitants, saying, however, the pivotal question occurs whether the City of Camden did make a contract imposing that liability on the water company. The pivotal question here is, did the Home Water Supply Company contract with the City of Spartanburg to assume liability for losses occurring by reason of negligence in the performance of its duty? The decision of the Supreme Court of South Carolina in *Ancrum vs. Camden Water, Etc., Co.*, *supra*, should, we submit, be very persuasive in view of the fact that the contract in the case at bar is **very** similar to the contract in the case of *Ancrum vs. Camden*, *supra*. The Court in the last mention case observes:

"In the first place, it is to be observed that the presumption is that parties contract for their own benefit and not for that of others not parties to the contract. So a contract entered into by a city is presumed to be for the city's own benefit, as a municipality, that is for the benefit of the municipal public as a whole, and not for the benefit of its inhabitants as individuals. Hence in order for the plaintiff to have the benefit of the contract, it is not sufficient for him to show that the defendant contracted with the city to have an adequate supply of water to extinguish fires, but he must show further, that it was intended that he should be the di-

rect beneficiary of this provision to the extent that the defendant should indemnify him for his fire losses due to its negligence. There will hardly be difference of opinion that there are many public municipal purposes to be attained by a contract of this sort leaving out of view the citizen as an individual. The general municipal purpose of a water supply is to promote the prosperity of the city. This it does by lessening the risk of destruction of property by fire, by lowering the rate of insurance, increasing the general sense of security, and therefore the general happiness, diminishing the risk of numbers of persons being thrown out of employment, and generally in giving steadiness and confidence to the life and enterprise of the city. These are the inducements to the city for entering into the contract, and it is for these municipal purposes that it pays for the maintenance of waterworks for fire protection. For the attainment of these municipal ends the city has the right to pay out public funds. It may well be doubted whether it has the right to apply public funds to the larger compensation which a water company of necessity must charge for the enormous peril of having to pay for all private property lost by its negligence. Such expenditure of municipal funds raised by taxation of all the property would be an unjust discrimination in favor of those whose property is exposed to fire loss and against those whose property is not subject to that peril. There is at least a strong presumption against a municipality undertaking to pay for such indemnity from the public revenue. True, the water company would be liable only for losses due to its negligence. But the negligence would be chargeable to the company for its inspector of machinery to overlook a defect which he ought to have observed in time to remedy it, for a pumper to fail in his duty, for an employee carelessly to break a main so that the water would be wasted, for the company to have adequate machinery; in brief for it to fail in the opinion of the jury to be diligent in almost any of the innumerable details incident to the conduct of such a business. In

addition to this it is considered, as held in some jurisdictions, that the action for losses in a case like this is an action for tort, then for their fire losses the insurance company would be subrogated to the rights of the owner of the property and entitled to recover from the water company. *Mobile Ins. Co. vs. Columbia and R. R. Co.*, 408, 44 Am. St. 731 note; *Aetna Ins. Co. vs. C. & W. C. Ry. Co.*, 76 S. C. 101, *Am. B. Co. vs. Nat., etc., Bank*, 44 Am. St. 504 note. That a water company assumed such liabilities would have to demand a very large compensation to have any profit or even to save itself from bankruptcy is most obvious. When it is asserted that a city has undertaken to pay such indemnity to its individual inhabitants, and that the water company has assumed it, the contract relied on ought to show clearly that such payment by the city and indemnity by the water company were intended.

"The contract now under consideration contains no direct undertaking to respond to the individual inhabitant for fire losses; the stipulation that it shall keep a sufficient water supply for the protection of public and private property is naturally to be referred to the purpose of the city to promote the general municipal welfare in the manner we have pointed out, rather than to indemnify individual property owners from fire loss. The compensation to be paid is fifty dollars each for **seventeen hydrants**, a sum on its face utterly inadequate **to meet the expenses of furnishing the water** and to afford compensation for the enormous risk the plaintiff insists was assumed. These considerations seem to show plainly that the parties did not contemplate by their contract the assumption of liability by the water company for the plaintiff's fire losses arising from its neglect to furnish an adequate water pressure.

"We conclude that the obligations and liabilities of the parties are limited by the contract, and that the defendant did not contract to pay the losses of all the citizens of the City of Camden by fires which would have been extinguished if it had not neglected to comply with its contract."

If the plaintiff had been the loser in the first instance, being a non-resident, it is possible, though we shouldn't say probable, that this Court could disregard the law as uttered by the highest Court of this State, but when we take into consideration the fact that had the action been brought by Spartan Mills, the original loser, such action would have had to have been brought in the State Courts, and such being the case, the Court of this State would more than likely have followed its decision in the preceding case. By what system of reasoning then would the plaintiff, who is merely subrogated to the rights of the Spartan Mills, have a greater right than the original loser? The statute of South Carolina provides (Code of Civil proc., Sec. 145): "Actions for the following causes of action must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the Court to change the place of trial: 1. For recovery of penalty or forfeiture imposed by statute * * *. 2. Against a public officer or a person specially appointed to execute his duties for an act done by him in virtue of his office * * *." Sec. 46, *supra*, is as follows: "In all other cases the action shall be tried in the county in which the defendant resides at the time of the commencement of the action * * *."

The language as to trial of action in county where defendant resides is imperative, and places the exclusive jurisdiction there. *Blakely vs. Frazier*, 11 S. C. 122; *Trapier vs. Waldo*, 16 S. C. 276; *Steele vs. Exum*, 22 S. C. 276; and if judgment be rendered in another county the objection to jurisdiction may be first raised in Supreme Court. *Ware vs. Henderson*, 25 S. C. 385; *Bell vs. Fludd*, 28 S. C. 313.

No right to sue in federal courts exists except in such cases as are expressly provided for by Federal Statute or the Constitution. *Band of U. S. vs. Deveau*, 5 Chanc. 61, 3 L. Ed. 38; and a citizen of this State would not be allowed to maintain his action in this State against another citizen of this State under Sec. 1 and Sec. 2 of Art. III of the Constitution of the United States, in a matter of this kind.

The Courts of the United States have always looked askance at anyone who has attempted to treat the municipality as his agent or as being directly answerable to him in the

conduct of its affairs, and has stated in substance "that no citizen can be heard to contend that the laws and ordinances under which a municipal water supply has been created and regulated are invalid because his individual and personal views have not been formally obtained and considered." *Parsons vs. District of Columbia*, 170 U. S. 45, 42 L. Ed. 943.

This Court has expressly stated, in the case of *St. Tammany Waterworks Company vs. New Orleans Waterworks Company*, 120 U. S., 30 L. Ed., page 565, in speaking of whose province it was to determine whether or not the public health would be better protected or the public comfort subserved in the matter of furnishing water, "that these are matters which neither the appellant nor individual citizens may determine for the constituted authorities."

In May, 1905, issue of 3rd Michigan Law Review No. 7, at pages 501-507, this question is very interestingly and ably reviewed in an article on the liability of water companies for fire losses. The review of the authorities is made with so much care, and contains so many valuable suggestions, that we take the liberty of quoting at length from the same, as follows:

"The most striking feature of the water company's position is that in 19 jurisdictions where the exact question presented in this case has risen in 22 cases, the holding has been for the defendant as a matter of law. These jurisdictions include Connecticut (*Nickerson vs. The Bridgeport Hydraulic Co.*, 46 Conn. 24 (1878), opinion by Park, C. J.); New York (*Wainwright vs. Queen's Co. Water Co.*, 78 Hun. 146, 28 N. Y. Supp. 987, N. Y. Sup. Co. 1894), opinion by Brown, P. J.); Pennsylvania (*Beck vs. Kittanning Water Co.*, 11 Atl. 300 (Pa. 1887); West Virginia (*Nicholl vs. Huntington Water Co.*, 53 W. Va. 348, 44 S. E. 290 (1903, opinion by Paffenbarger, J.); Tennessee (*Foster vs. Lookout Water Co.*, 3rd Lea 42 (Tenn. 1879), opinion by Cooper, J.); Georgia (*Fowler vs. Athens City Waterworks*, 83 Ga. 219, 9 S. E. R. 673 (1889), opinion by Bleckley, J. C.); Mississippi (*Wilkerson vs.*

Light, Heat and Water Co., 78 Miss. 389, 28 Sp. 877 (Miss. 1900), opinion by Boothe, Special Judge); Texas (House vs. Houston Waterworks Co., 88 Tex. 233, 28 L. R. A. 532, opinion by Brown, J.); Nevada, (Ferris vs. Carson Water Co., 16 Nev. 44 (1881), opinion by Belknap, J.); Idaho (Bush vs. Artesian Hot and Cold Water Co., 4 Idaho 618, 43 Pac. 69 (1895), opinion by Houston, J.); California (Town of Ukiah City vs. Ukiah Water & Imp. Co., 75 Pac. 773 (Cal. 1904), opinion by Henshaw, J.); Iowa, (Davis vs. Clinton Waterworks, 54 Ia. 59 (1890), opinion by Beck, J.); Becker vs. Keokuk Waterworks, 79 Ia. 419 (1890), opinion by Robinson, J.); Nebraska (Eaton vs. Fairbury Waterworks Co., 37 Neb. 546 (1893), opinion by Ryan, J.); Kansas (Mott vs. Cherryville Water Co., 48 Kan. 12, 28 Pac. 989 (1892), opinion by Horton, C. J.); Missouri (Howsman vs. Trenton Water Co., 119 Mo. 304 (1893), opinion by Brace, J.); Indiana (Fitch vs. Seymore Water Co., 139 Ind. 214, 37 N. E. R. 982 (1894), opinion by Howard, J.); Ohio (Akron Waterworks Co. vs. Brownless, 10 Ohio Cir. Ct. Repts. 620 (1895), opinion by Caldwell, J.); Blunk vs. Dennison Water Supply Co., 73 N. E. R. 210 (Ohio 1905); United States (Boston Safe Deposit & T. Co. vs. Salem Water Co., 94 Fed. 238 (1899), U. S. Cir. Ct. N. Dist. of Ohio. Of these twenty-two cases, arising in these nineteen jurisdictions, sixteen (Nicholls vs. Huntington Water Co., 53 W. Va. 348, 44 S. E. R. 290 (1903); Fitch vs. Seymore Water Co., 139 Ind. 214, 37 N. E. R. 982 (1894); Davis vs. Clinton Waterworks Co., 54 Ia. 59 (1880); Becker vs. Keokuk Waterworks, 79 Ia. 419 (1890); Bush vs. Artesian Hot and Cold Water Co., 4 Idaho 618, 53 Pac. 59 (1895); Wilkinson vs. Light, Heat and Water Co., 78 Miss. 389, 28 So. 877 (1900); Boston Safe Deposit & T. Co. vs. Salem Water Co., 94 Fed. 238 (1899), U. S. Cir. Ct. N. Dist. Ohio; Eaton vs. Fairbury Waterworks Co., 37 Neb. 546 (1893); Ferris vs. Carson Water Co., 16 Nev. 44 (1881); Britton vs. Green Bay Waterworks, 81 Wis. 48 (1902); Nickerson vs. Bridge-

port Hydraulic Co., 46 Conn. 24 (1878); *Howsman vs. Trenton Water Co.*, 119 Mo. 304 (1893); *House vs. Houston Waterworks Co.*, 88 Tex. 233, 28 L. R. A. 532; *Foster vs. Lookout Water Co.*, 3 Lea. 42 (Tenn. 1879); *Wainwright vs. Queens Co. Water Co.*, 78 Hun. 146, 28 N. Y. Supp. 987 (N. Y. Supreme Court 1894); *Blunk vs. Dennison Water Supply Co.*, 73 N. E. R. 210 (Ohio 1905), came up on demurrer."

The plaintiff in each case had stated his case in his own way, with all the completeness possible, setting forth with monotonous sameness just what we have in the case at bar, a contract between the water company and the municipality to furnish a water supply at fire hydrants for fire protection, or else to furnish at fire hydrants a specified pressure; that the plaintiff was a resident of the town and paid taxes or water rates, that there was a fire, that the fire company attended and could have put out the fire and saved the plaintiff's property if the water company had fulfilled its contract with the municipality,

"yet in fifteen (all except *Wainwright vs. Queens Co. Water Co.*, 78 Hun. 146) of these sixteen cases the demurrer was sustained in the lower Court and the case was affirmed above. In three, *Beck vs. Kittanning Water Co.*, 11 Atl. 300 (Penn. 1887); *Stone vs. Uniontown Water Company*, 4 Pa. Dist. Repts. 431 (1895); *Fowler vs. Athens City Waterworks*, 83 Ga. 219, 9 S. E. R. 673 (1889), cases the Court below nonsuited the plaintiff and this was affirmed. In three cases there was a verdict for the plaintiff. In the Upper Court the case was in one instance reversed (*Akron Waterworks Co. vs. Brownless*, 10 Ohio Cir. Ct. Repts 620 (1895); in the other two the order granting a new trial was affirmed (*Motte vs. Cherryville Water Co.*, 48 Kan. 18, 28 Pac. 989 (1892); *Town of Ukiah City vs. Ukiah Water & Imp. Co.*, 75 Pac. 773 (Cal. 1904).

"Of these twenty-two cases, arising in these nineteen jurisdictions, it is worth while to remark that every one went off on the merits of the legal controversy. With the exception of the Missouri (*Howsman vs.*

Trenton Water Co., 119 Mo. 304 (1893) perhaps, where only the right to sue in contract was considered, not one went up on the form of the action. In every case but two (Nickerson vs. Bridgeport Hydraulic Co., 46 Conn. 24 (1878); Nichol vs. Huntington Water Co., 53 W. Va. 348, 44 S. E. 290 (1903)) the pleading was under a code, and it made no difference what the form of the action was, whether contract or tort, and in all of them the plaintiff failed because he had no cause of action upon any theory. In some cases the Court considered both the theory of contract and of tort. (Fowler vs. Athens City Waterworks, 83 Ga.; House vs. Houston Waterworks, 88 Tex. 23, 28 L. R. A. 532; Britton vs. Green Bay Waterworks, 81 Wis. 48; Fitch vs. Seymore Waterworks, 139 Ind. 214; Nickerson vs. Bridgeport Hydraulic Co., 46 Conn. 24; Nicholl vs. Hunting Water Co., 53 W. Va. 348. In some the Court was indifferent to terminology (Wainwright vs. Queens Co. Water Co.; Beck vs. Kittanning Water Co.; Stone vs. Uniontown Water Co.; Foster vs. Lookout Water Co.; Wilkerson vs. Light, Heat and Water Co.; Bush vs. Artesian Hot and Cold Water Co.; Mott vs. Cherryville Water Co.; Town of Ukiah vs. Ukiah Water & Imp. Co.) In others still the Court assumed that if there was any cause of action it must be in contract. (Ferris vs. Carson Water Co., Nev.; Davis vs. Clinton Waterworks, Iowa; Becker vs. Keokuk Waterworks, Iowa; Blunk vs. Dennison Water Supply Co., Ohio.) In Connecticut and West Virginia, the two States which had a common law system of pleading, the action was on the case in tort for damages. (Nickerson vs. Bridgeport Hy. Co., 46 Conn.; Nicholl vs. Huntington Water Co., 53 W. Va.) In both a demurrer to the declaration was sustained, the Court considering whether any action lay either in contract or tort."

Thus we have a solid array of jurisdictions where the plaintiff was denied a cause of action of any grand whatsoever.

"It is a further element of strength in these cases that none of them go off upon the ground that the Court does not recognize any exceptions to the rule that a person not a party to the contract cannot sue on it. On the contrary, all are decided, either explicitly or tacitly, upon the assumption that every recognized exception to that rule is in force. (Howsman vs. Trenton Water Co., Ferris vs. Carson, Eaton vs. Fairbury Waterworks, Davis vs. Clinton Waterworks, Blunk vs. Dennison Water Supply Works) and some of the cases, for instance, for the sake of argument admit the right of any general beneficiary to sue upon contract (Wilkerson vs. Light, Heat and Water Co., Howsman vs. Trenton Water Co., Blunt vs. Dennison Water Supply Co.) An independent examination of the law in each jurisdiction where the water cases referred to are decided shows that in every one, except perhaps Pennsylvania * * * and Connecticut * * * cases sustaining the sole beneficiary's right to recover, * * * also the rule that a person not a party to the contract may sue if he be the sole beneficiary of it was recognized. These two constitute the only two and definite exceptions to the rule that a person not a party to a contract cannot sue on it. It is not possible then to distinguish the cases for the defendant on the ground that the jurisdictions where they were decided did not recognize the exceptions which permit third persons in some cases to sue upon contracts to which they were not parties."

The Court in the case of Green Bay Water Co., 81 Wis. 48, has well said:

"This Court has no disposition or tendency to engraft new, strange and radical principles on the body of our well established law, under the false guise of progress to meet the spirit of the age. Principles which reason have established and long experience has sanctioned are very apt to be the best that legislative and

judicial wisdom can devise and the safest criterion of judicial action."

Respectfully submitted,

I. A. PHIFER,

Of Counsel for Respondent.

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Counsel for Defendant-Respondent.

Thomas Ruffin
of Counsel

GERMAN ALLIANCE INSURANCE COMPANY *v.*
HOME WATER SUPPLY COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
FOURTH CIRCUIT.

No. 19. Argued April 26, 1912.—Decided December 2, 1912.

A municipality is not bound to furnish water for fire protection, and if it voluntarily undertakes to do so it does not subject itself to a greater liability.

While a diversity of opinion exists, a majority of the American courts hold that the taxpayer has no such direct interest in an agreement between the municipality and a corporation for supplying water as will allow him to sue either *ex contractu* for breach, or *ex delicto* for violation, of the public duty thereby assumed.

In this case *held* that a taxpayer has no claim against a water supply company for damages resulting from a failure of the company to perform the contract with the municipality.

One agreeing to perform a public service for a municipality is responsible for torts to third persons, but for omissions and breaches of contract he is responsible to the municipality alone.

A contract between a public service corporation and the municipality should not be unduly extended so as to introduce new parties and new rights and subject those contracting to suits by a multitude of

persons for damages for causes which could not in the nature of things have been in contemplation of the parties.

The conclusion that a property owner has no claim against a water supply company for failure to conform to the contract does not deprive him of any right, for had the municipality been guilty of the same acts no suit could be maintained.

In *Guardian Trust Co. v. Fisher*, 200 U. S. 57, the contract with the water company expressly provided for liability of the company to third parties, and the state court having held that, under the law of North Carolina, an action of this nature can be maintained, that question was not in issue in this court.

What is said in an opinion of this court must be limited to the facts and issues involved in the particular record under investigation.

Guardian Trust Co. v. Fisher did not overrule *National Bank v. Grand Lodge*, 98 U. S. 124, holding that a third person cannot sue for the breach of a contract to which he is a stranger unless in privity with the parties and is therein given a direct interest.

"THE Spartan Mills" owned a number of houses in Spartanburg, South Carolina. They were damaged by fire on March 25, 1907. The German Alliance Company, which had insured the buildings, paid \$68,000, the amount of the loss, took from the mills an assignment "of all claims and demands against any person arising from or connected with the loss or damage," and brought suit, in the United States Court for the District of South Carolina, against the Home Water Supply Company, on the ground that the fire could easily have been extinguished and the damage prevented if the Water Company had complied with its contract and duty to furnish the inhabitants of the city with water for fire protection.

The complaint alleged that on February 14, 1900, the City Council adopted an ordinance, ratifying a contract, previously prepared, between the city and the Water Company, by which the latter was empowered, for a term of 33 years, to lay and maintain pipes in the streets and operate waterworks with which "to supply the city and its inhabitants with water suitable for fire, sanitary and domestic purposes." The city agreed to use the hydrants

for the extinguishment of fires and sprinkling purposes only; to make good any injury which might happen to them when used by its fire department; to pay rent for fire protection, for the term of ten years, at the rate of \$40 per year for each hydrant, and, annually, to levy a tax sufficient to pay what should become due under the contract.

The company agreed to lay at least six miles of pipe, but on 60 days' notice from the city would lay additional pipes and install hydrants, not less than ten to the mile, for each of which the city was to pay \$40 per year.

The company agreed to keep all hydrants supplied with water for fire protection, and to maintain a height of at least 70 feet of water in the standpipe. If any hydrant remained out of order for more than 24 hours, after notice, the company was to pay the city \$7 per week while each hydrant was unfit for use.

It was further alleged that in 1905 and 1906 the city ordered the company to "put in certain hydrants with connecting pipes," "which order, if obeyed, would have carried water protection to within about 200 feet of the building which first caught fire on March 25, 1907, instead of 650 feet, which was the distance of the nearest hydrant to the said fire on said day; that in violation of its duty and obligation to adequately protect the property from fire, and in defiance of the order of council, the defendant failed to make such extensions, and as a direct result there was no plug near enough to furnish water to extinguish said fire—all due to the defendant's culpable and wilful negligence and disregard of duty and obligations to said city and its inhabitants."

Other breaches were charged, in laying 4-inch instead of 6-inch pipe; in neglecting to install the electric cut-off, and "in failing absolutely to furnish water with which to extinguish such fire and prevent its spreading to other houses."

The defendant made no question as to the right of the

Insurance Company to maintain the action if the Spartan Mills could have done so, but filed a general demurrer which was sustained July 14, 1908. That judgment was affirmed November 4, 1909, by the Circuit Court of Appeals, (174 Fed. Rep. 764), and the case was brought here by writ of certiorari.

Mr. Hartwell Cabell, with whom *Mr. Stanyarne Wilson* was on the brief, for petitioner:

The only question presented by the demurrer to the complaint is whether an action in tort will lie against a private water company whose negligence and willful disregard of its duties in supplying water has been the proximate cause of loss of plaintiff's property.

Guardian Trust Co. v. Fisher, 200 U. S. 57, sustained such a right against a water company by whose negligent performance of its duties private property had been destroyed; that decision was binding upon the lower Federal courts and the affirmance of the judgment of the Circuit Court dismissing the complaint, was in effect a refusal of the court below to follow the law as laid down by this court. In that case the judgment recited that the recovery was for a tortious injury and damage done by the negligence of the defendant. *Fisher v. Greensboro Water Supply Co.*, 128 No. Car. 375.

The previous cases in North Carolina allowing recoveries against private water companies under similar circumstances (*Gorrell v. Greensboro Water Supply Co.*, 124 No. Car. 328; *Jones v. Durham Water Co.*, 135 No. Car. 553) proceeded upon the theory of the right of the party aggrieved to recover in an action upon the contract with the municipality, holding that the contract had been entered into for the benefit of the inhabitants, and that therefore they were entitled to maintain an action thereon. There was therefore no "rule of property" in North Carolina arising out of numerous adjudications upon the con-

struction of § 1255, which Federal courts would feel inclined to follow.

Federal courts in construing state statutes have uniformly declared their independence of state decisions, where the questions involved were matters of a general nature; or the terms to be defined those of general use in jurisprudence. *Swift v. Tyson*, 16 Peters, 1; *B. & O. R. R. v. Baugh*, 149 U. S. 368; *Venice v. Murdock*, 92 U. S. 494, 501; *Pleasant Township v. Ætna Life Ins. Co.*, 138 U. S. 67; *Burgess v. Seligman*, 107 U. S. 20, 34.

This court has committed the Federal courts to the doctrine that a private water company, when it enters upon the performance of its contract with a municipality, incurs certain duties to the public, the breach of which, when attended by injury to private property, constitutes a tort, and that such injury is not *damnum absque injuria*. *Guardian Trust Co. v. Fisher*, *supra*; and see *Mugge v. Tampa Water Works Co.*, 42 So. Rep. 81; *Ancrum v. Camden Water, Light & Ice Co.*, 64 S. E. Rep. 151; *Knuth v. Butler Elect. Ry.*, 148 Fed. Rep. 73.

Private corporations who contract with municipalities to supply water for public and private use, enjoy, through the nature of their business, valuable franchises, rights and privileges. They are granted monopolies for long terms; they exercise the right of eminent domain, by virtue of which they use the public streets and highways, condemn private property, enter upon the premises of citizens, and possess other privileges of an extraordinary nature. In return and in consideration of a stipulated charge, they undertake to furnish water to the municipality and its inhabitants for fire protection and domestic purposes.

The English courts from early times have held that when an individual or a private corporation for valuable consideration has contracted to render services of a public nature, such individual or corporation by operation of law

becomes charged with a duty to the public and may be held liable for the negligent discharge of that duty to any member of the public who may be injured thereby. *The Mayor &c. v. Henley*, 3 B. & A. 77; *Paine v. Partridge*, 1 Shower, 255; *Mayor of Lynn v. Turner*, Cowp. 86; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686; *Robinson v. Chamberlain*, 34 N. Y. 389; *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648; *Little v. Banks*, 85 N. Y. 258; *Lampert v. Lacledé Gas Light Co.*, 14 Mo. App. 376; *Appleby v. The State*, 16 Vroom. (N. J.) 161.

The right of a private citizen to recover as for a tort against a water company whose failure to furnish adequate water for fire protection has caused damage, has been sustained in a number of cases. *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Kentucky, 340; *Griffin v. Goldsboro Water Co.*, 122 No. Car. 206; *Fisher v. Greensboro Water Supply Co.*, 128 No. Car. 375; *Mugge v. Tampa Water Works Co.* (Fla.), 42 So. Rep. 81.

The neglect or failure to do the things that should be done in order to perform the contract properly, is not non-feasance, but misfeasance. *Gregor v. Cady*, 82 Maine, 131, 136; *Olmstead v. Morris Aqueduct*, 17 Vroom. 495, 501; *House v. Houston W. W. Co.*, 88 Texas, 233; *Wainwright v. Queens Co. Water Co.*, 78 Hun, 146; *Ukiah City v. Ukiah Water Co.*, 75 Pac. Rep. 773; *Howsman v. Trenton Water Co.*, 119 Missouri, 304, holding that the duty to furnish water at the hydrants was one owing to the general public in its collective capacity and not to individuals composing the general public are not supported in reason and are answered in *Planters' Oil Mill v. Monroe Waterworks & Light Co.* (1900), 52 La. Ann. 1243, p. 1250.

The question is, for whose benefit the water was brought to the hydrant to be used to extinguish fires, that of the city as such or of the individual property owner whose property lies within the protected zone?

Ferris v. Carson Water Co., 16 Nevada, 44, can be distinguished, and see *Bonaparte v. Camden & Amboy R. R. Co.*, Baldwin C. C. (U. S.) 205, 223; *Kiernan v. Metropolitan Construction Co.*, 170 Massachusetts, 378; *Borough of Washington v. Washington Water Co.*, 4 Robbins (N. J.), 254; *Public Service Corp. v. American Lighting Co.*, 1 Robbins, 122, as to the rights of individuals and duties of public utilities corporations.

The immunity from suit enjoyed by a municipality which undertakes to furnish water for fire purposes does not inure to the benefit of a private water company with which it has contracted for such supply. The cases which hold otherwise, *Britton v. Green Bay Water Co.*, 81 Wisconsin, 48; *Nichol v. Huntington Water Co.*, 53 W. Va. 348; *Akron Water Works Co. v. Brownless*, 10 Ohio C. C. 620, are in error.

The individual property owner may be without a remedy against the city simply because the city in providing fire protection exercises the sovereign power of the State and hence cannot be sued, as held in *Springfield Ins. Co. v. Keeseville*, 148 N. Y. 46, but it does not follow that because a municipality is not liable to individuals, a private water company which undertakes to perform the same acts is also not liable. *Mills W. W. Co. v. Forrest*, 97 N. Y. 97.

The objection that unless water companies are protected from the consequences of their own faults capitalists would not readily seek investment in enterprises involving such incalculable hazards, and the general public would lose the benefits now derived from them should not prevail.

To permit a tortfeasor to escape the result of his own acts or omissions merely because his disregard of the duties laid upon him by law has caused a loss to others, which, by reason of its magnitude it would ruin him to pay, is surely a strange doctrine.

Mr. I. A. Phifer, with whom *Mr. Ralph K. Carson* was on the brief, for respondent.

MR. JUSTICE LAMAR, after making the foregoing statement of facts, delivered the opinion of the court.

In *Ancrum v. Camden Water Company*, 82 S. Car. 284, the Supreme Court of South Carolina, construing a contract much like the one here involved, held that a taxpayer could not maintain an action against a Water Company for damage due to its failure to furnish water as required by such an agreement with the city. The plaintiff, however, contends that although the present suit is for damage to property located in South Carolina, that decision is not of controlling authority, because it was rendered two years after this action was begun. Relying on *Burgess v. Seligman*, 107 U. S. 20, it insists that when the contract was made, February, 1900, there was no settled state law on the subject, and therefore the Federal courts must decide for themselves, as matter of general law, the much controverted question as to a water company's liability to a taxpayer for failure to furnish fire protection, according to the terms of its contract with the city.

The courts have almost uniformly held that municipalities are not bound to furnish water for fire protection. Such was the unquestioned rule when they relied, as some still do, on wells and cisterns as a source of supply; nor was there any increase of liability with the gradual increase of facilities—though, with the introduction of reservoirs, standpipes, pumping stations and steam engines, cities were frequently sued for damages resulting from an inadequate supply or insufficient pressure. But the city was under no legal obligation to furnish the water; and if it voluntarily undertook to do more than the law required, it did not thereby subject itself to a new or greater liability. It acted in a governmental capacity, and was

no more responsible for failure in that respect than it would have been for failure to furnish adequate police protection.

If the common law did not impose such duty upon a public corporation, neither did it require private companies to furnish fire protection to property reached by their pipes. And there could, of course, be no liability for the breach of a common law, statutory or charter duty which did not exist. It is argued, however, that even if, in the first instance, the law did not oblige the company to furnish property owners with water, such a duty arose out of the public service upon which the defendant entered. But if, where it did not otherwise exist, a public duty could arise out of a private bargain, liability would be based on the failure to do or to furnish what was reasonably necessary to discharge the duty imposed. The complaint proceeds on no such theory. It makes no allegation that the defendant failed to furnish a plant of reasonable capacity, or neglected to extend the pipes where they were reasonably required. Nor is it charged that what the company actually did was harmful in itself or likely to cause injury to others, so as to bring the case within the principle applicable to the sale of unwholesome provisions, or misbranded poisons which, in their intended use, would be injurious to purchasers from the original vendee. So that, notwithstanding numerous charges of culpable, wanton and malicious neglect of duty, this suit—whether regarded as *ex contractu* or *ex delicto*—is for breach of the provisions of the contract of February 14, 1900, which must, therefore, be the measure of plaintiff's right and of the defendant's liability.

Whether a right of action arises, out of such a contract, in favor of a taxpayer is a matter about which there has been much discussion and some conflict in decisions. Although for nearly a century it has been common for private corporations to supply cities with water under this

sort of agreement, we find no record of a suit like this prior to 1878, when the Supreme Court of Connecticut, in a brief decision (*Nickerson v. Hydraulic Co.*, 46 Connecticut, 24), held that the property owner was a stranger to the agreement with the municipality, and, therefore, could not maintain an action against the company for a breach of its contract with the city. Since that time similar suits, some in tort and some for a breach of the contract, have been brought in many other States. In view of the importance of the question, the subject has been examined and reexamined, the contract subjected to the most critical analysis and many elaborate opinions have been rendered. They are cited in 3 Dillon Munic. Corp., § 1340, and in *Ancrum v. Water Co.*, 82 S. Car. 284.

From them it appears that the majority of American courts hold that the taxpayer has no direct interest in such agreements and, therefore, cannot sue *ex contractu*. Neither can he sue in tort, because, in the absence of a contract obligation to him, the water company owes him no duty for the breach of which he can maintain an action *ex delicto*. A different conclusion is reached by the Supreme Courts of three States, in cases cited and discussed in *Mugge v. Tampa Water Works*, 52 Florida, 371. They hold that such a contract is for the benefit of taxpayers, who may sue either for its breach, or for a violation of the public duty which was thereby assumed.

The plaintiff presses these decisions to their logical conclusion and sues,—not for negligence in operating the plant, but for breach of the contract of construction. The complaint charges that as a direct consequence of the refusal to lay the pipes, as provided by the contract, there was no plug near enough to extinguish the fire. The other allegations as to putting in 4-inch instead of 6-inch pipe and failing to install the electric cut-off are immaterial, except on the theory that if the property owner was, indeed, a beneficiary, it, after acceptance, would be en-

titled to all the rights of the original promisee, and if not otherwise injured, might at least recover nominal damages for any breach. By the same reasoning it, with the other members of the class, might release the company from liability already incurred, or even discharge it altogether from the duty of carrying out the agreement in the future. If this did not entirely substitute the taxpayer for the municipality, it would at least subject the promisor to liability to many, where it only had contracted with one. *Dow v. Clark*, 7 Gray, 198, 201.

In many jurisdictions a third person may now sue for the breach of a contract made for his benefit. The rule as to when this can be done varies in the different States. In some he must be the sole beneficiary. In others it must appear that one of the parties owed him a debt or duty, creating the privity, necessary to enable him to hold the promisor liable. Others make further conditions. But even where the right is most liberally granted it is recognized as an exception to the general principle, which proceeds on the legal and natural presumption, that a contract is only intended for the benefit of those who made it. Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least show that it was intended for his direct benefit. For, as said by this court, speaking of the right of bondholders to sue a third party who had made an agreement with the obligor to discharge the bonds, they "may have had an indirect interest in the performance of the undertakings, but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names." *Nat. Bk. v. Grand Lodge*, 98 U. S. 123, 124. *Hendrick v. Lindsay*, 93 U. S. 143, 149; *National Savings Bk. v. Ward*, 100 U. S. 195, 202, 205.

Here the city was under no obligation to furnish the manufacturing company with fire protection, and this

agreement was not made to pay a debt or discharge a duty to the Spartan Mills, but, like other municipal contracts, was made by Spartanburg in its corporate capacity, for its corporate advantage, and for the benefit of the inhabitants collectively. The interest which each taxpayer had therein was indirect—that incidental benefit only which every citizen has in the performance of every other contract made by and with the government under which he lives, but for the breach of which he has no private right of action.

He is interested in the faithful performance of contracts of service by policemen, firemen, and mail-contractors, as well as in holding to their warranties the vendors of fire engines. All of these employés, contractors, or vendors are paid out of taxes. But for the breaches of their contracts the citizen cannot sue—though he suffer loss because the carrier delayed in hauling the mail, or the policeman failed to walk his beat, or the fireman delayed in responding to an alarm, or the engine proved defective, resulting in his building being destroyed by fire. 1 Beven, *Negligence in Law* (3d ed.), 305; Pollock on Torts (8th ed.), 434, 547; *Davis v. Clinton*, 54 Iowa, 59, 61.

Each of these promisors of the city, like the Water Company here, would be liable for any tort done by him to third persons. But for acts of omission and breaches of contract, he would be responsible to the municipality alone. To hold to the contrary would unduly extend contract liability, would introduce new parties with new rights, and would subject those contracting with municipalities to suits by a multitude of persons for damages which were not, and, in the nature of things, could not have been, in contemplation of the parties.

The result is that plaintiff cannot maintain this action, and though based upon the general principle that the parties to a contract are those who are entitled to its rights,

is in accordance with the particular intent of those who made this agreement.

If the company had, indeed, made a valid contract for the benefit of a third person, the amount of the damages for which it might be liable would be immaterial. Yet where there is no such express agreement, and liability to a taxpayer is sought to be raised by implication, it is proper to test the correctness of the proposed construction by noting the results to which it would lead. The contract was made in February, 1900. By its terms the city was, during a period of 10 years, to pay \$40 per annum for each hydrant. During that time the property subject to damage by fire might double or quadruple in value. The failure to provide that the water rent of \$40 per hydrant should rise or fall with the increase or decrease in such values indicates that liability for damage to that property was not in the contemplation of the parties and that no payment therefor was included in the price for each hydrant. Otherwise the amount of payment would naturally have varied with the risk assumed.

In some States it is held that, in the absence of a statute, a city can neither directly nor indirectly make a contract with a water company that the latter should pay private individuals for fire damage, since that would involve the use of public money to secure a private benefit to the owner of private property. *Hone v. Water Co.*, 104 Maine, 217. In *Ancrum v. Water Co.*, *supra*, the South Carolina court held that the amount paid per hydrant was so insignificant by comparison with the enormous risk involved, as clearly to indicate that neither the city nor the water company intended that the latter should be liable to the taxpayer for a breach of the company's contract with the city.

This conclusion deprives the property owner of no right, for if the city had owned the works, and had been guilty of the same acts as are charged against the water company

here, no suit could have been maintained against the municipality. There was no creation of a right to fire protection if, instead of doing so itself, the city contracted with a private company to furnish water. It bought the citizen no new right of action, and did not bargain to secure for him an indemnity against loss by fire, but left him to protect himself against that hazard by insurance, paying the premium direct to an insurance company instead of indirectly through taxation. When, in pursuance of such precaution, the Spartan Mills insured the houses, and the plaintiff later settled the fire loss, there was no right of action in favor of the manufacturing company against the Water Company to which the Insurance Company could be subrogated.

The plaintiff urges that, whatever the rule elsewhere, it is entitled to recover under the decision in *Guardian Trust Company v. Fisher*, 200 U. S. 57. But the facts there differ from those in this record. There the water company had an exclusive right, to use the streets in the city of Greensboro, under an ordinance which, among other things, provided that "said water company shall be responsible for all damage sustained by the city, or any individual or individuals, for any injury sustained from the negligence of the said company, either in the construction or operation of their plant." (p. 58.) Buildings were destroyed as a result of the negligent failure of the company to furnish sufficient water while operating its plant. The owner brought suit against the water company in the courts of North Carolina, where it had previously been settled that such actions could be maintained. He recovered a judgment "for the tortious injury and damage done to the plaintiff by the negligence of the defendant." 128 No. Car. 375; 115 Fed. Rep. 187. Execution issued, but no levy could be made, because the property of the water company was in possession of a receiver, appointed in foreclosure proceedings pending in the United States

court. The plaintiff intervened therein, claiming that he was entitled to be paid before the bondholders by virtue of the North Carolina statute, which provided that "judgments for corporate torts" should take priority over older mortgages.

It was urged, among other things, by the bondholders that the suit in the state court was really for breach of contract, and that entering the judgment as for a tort did not change the nature of the action so as to entitle the plaintiff to the benefits of the North Carolina statute.

It was that question alone, as to the character of the suit and judgment, which was before this court. What was said in the opinion must be limited, under well-known rules, to the facts and issues involved in the particular record under investigation. The *Fisher Case* could not have decided the primary question as to the right of the taxpayer to sue, for that issue had been finally settled by the state court. It raised no Federal question and was not in issue on the hearing in this court. Neither did the *Fisher Case* overrule the principle, announced in *National Bank v. Grand Lodge*, 98 U. S. 123, 124, that a third person cannot sue for the breach of a contract to which he is a stranger unless he is in privity with the parties and is therein given a direct interest. The judgment of the Circuit Court of Appeals is

Affirmed.
